JD–43–05
Lake Buena Vista, FL

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GROSVENOR ORLANDO ASSOCIATES, LTD.,
d/b/a THE GROSVENOR RESORT, and its
general partners Grosvenor Properties, Ltd.,
Donald E. Werby and Robert K. Werbe

and

HOTEL EMPLOYEES AND RESTAURANT
EMPLOYEES, LOCAL 55, AFL-CIO

Cases 12-CA-18190
12-CA-18381 (-2,-4,-5)
12-CA-18467
12-CA-18518
12-CA-18576
12-CA-18830

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for the General Counsel.

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of Orlando, Florida, for the Charging Party.

Frank Horning, Esq. (*Thomas F. Egan, P.A.*),
of Orlando, Florida, for the Individual Discriminatees.

SUPPLEMENTAL DECISION

Findings of Fact and Conclusions of Law

Preliminary Statement

Benjamin Schlesinger, Administrative Law Judge. On September 30, 2001, the National Labor Relations Board issued its Decision and Order (336 NLRB 613), directing Grosvenor Orlando Associates, Ltd., d/b/a The Grosvenor Resort, its officers, agents, successors, and assigns, to take certain affirmative action, including that of offering full reinstatement to and making whole 44 discriminatees: Francisco Abreu, Andres Alvarez, Robert Baity, Rosetta Brown, Hector Caban,[1] Gilberto Carranza, Dorothy Collier, Ella Mae Davis, Lindsey Day, Carlos Delgado, Enoch Deneus, Oslaine Desir, Aida Febles, Maria Gillaspie, Deborah Goodman, Israel Hernandez, Lidia Hernandez, Maria Hernandez, Betty Jackson, Mollie Jackson, Flor Javier, Margarita Jimenez, Norma Jimenez, Jules Josaphat, Therese Josaphat, Dorzelia Joseph, Paul LeBlanc, Adisseau Louisius, Martin Malagon, Lourdes Matos, Frederic Meradin, Deborah

[1] Caban requested that he be referred to as "Caban," rather than "Caban-Gaston," as stated in the Compliance Specification.

Montgomery, Charitable Ovince, Joseph Paschal, Marie A. Pierre,[2] Louis Preval, Maria Quevedo,[3] Earl Rankin, Isidro Rodriguez, Feliza Ryland, Adriana Sepulveda, Raymond Smith, Cleofas Viscaino-Hernandez, and Flossie Williams. On October 8, 2002, the United States Court of Appeals for the Eleventh Circuit, in a memorandum, 52 Fed.Appx. 485 (Table), 2002 WL 31415439, enforced the Board's Decision, and on December 2, 2002, entered its mandate. This is a backpay proceeding to determine the amounts due to the discriminatees, instituted by the issuance of a Compliance Specification on July 14, 2004.[4]

At all material times, Grosvenor Orlando Associates, Ltd., d/b/a The Grosvenor Resort was a limited partnership formed under the laws of the State of California and has been jointly owned by its general partners, Grosvenor Properties, Ltd., Donald E. Werby, and Robert K. Werbe, and is engaged in the operation of a resort hotel and conference center known as The Grosvenor Resort, located at Walt Disney World Village in Lake Buena Vista, Florida. Grosvenor and, by virtue of their status as general partners, Grosvenor Properties, Werby, and Werbe, are each individually and severally liable for remedying the unfair labor practices described above. In this Decision, "Respondents" refers to the partnership and all of the partners; "the Grosvenor" refers to the hotel.

The Duty to Mitigate Damages Immediately

A substantial portion of this proceeding was devoted to Respondents' attack on the effort that the individual discriminatees made to mitigate their damages. On September 26, 1996, as a result of the Grosvenor's bad-faith bargaining with the Charging Party Hotel Employees and Restaurant Employees, Local 55, AFL-CIO, the employees struck. Four days later, on September 30, the Grosvenor discharged all of them. According to the Board's decision, 336 NLRB at 618, "September 30[, 1994] is the date of discharge for purposes of calculating back pay in compliance proceedings." The backpay period ended on December 9, 2002. Almost without exception, Respondents allege, the employees remained on the picket line and did not look for work immediately. For this reason, Respondents claim that they owe the employees nothing, until such time as the employees obtained new employment.

While the employees went on strike originally to protest the Grosvenor's unfair labor practices, on September 30, the day that they were discharged, the object of their strike implicitly changed to include protesting their discharge and getting their jobs back. In that sense, the picket line constituted a mass application for work to the Grosvenor. Union Organizer and Business Agent Gail Fabian testified that it was her hope that the strike would be successful and that the employees would be taken back, but her hopes began to wane after two or three weeks. In any event, the exclusion from backpay of the first several weeks after the mass discharge, in the circumstances of this proceeding, would serve to discourage the employees from engaging in their protected activities; and Respondents' insistence that the employees immediately leave the line and relinquish their right to recover their jobs, which, for many, included substantial seniority and accrued benefits, is unrealistic. Its position also disregards the trauma and disruption caused by the discharge of these employees, almost all of whom had been working for the Grosvenor for more than 7 years, 17 employees, for more than 10 years.

[2] Marie Laguerre-Pierre changed her name to Marie A. Pierre.

[3] Quevedo's name appears in the transcript as Maria Fatima Gurvedo Orias, but her Social Security Statement identifies her as Maria Quevedo.

[4] This compliance proceeding was tried in Lake Buena Vista and Orlando, Florida, on 12 days between November 15, 2004, and January 20, 2005.

Respondents' opposition is also contrary to Board law. "It is well settled that a discriminatee need not seek work instantly. The test is whether on the record as a whole the employee has diligently sought employment during the entire backpay period." *C-F Air Freight, Inc.*, 276 NLRB 481, 481 fn. 3 (1985); *A. S. Abell Co.*, 257 NLRB 1012, 1015 (1981); *Saginaw Aggregates*, 198 NLRB 598 (1972), enfd. mem. 482 F.2d 946 (6th Cir. 1973); *Nickey Chevrolet Sales, Inc.*, 195 NLRB 395, 398 (1972), enfd. 493 F.2d 103, 108 (7th Cir. 1974), cert. denied 419 U.S. 834 (1974); *Keller Aluminum Chairs Southern, Inc.*, 171 NLRB 1252, 1257 (1968), enfd. 425 F.2d 709 (5th Cir. 1970); *Cornwell Co.*, 171 NLRB 342, 343 (1968). For example, in *I.T.O. Corp. of Baltimore*, 265 NLRB 1322, 1323 (1982), despite the discriminatee's failure to register at the union's hiring hall for the first four weeks after he was fired and for other days during the backpay period, the Board looked at the entire backpay period of two years. The Board specifically found it "unnecessary to consider what [the discriminatee] did during the initial 4 weeks in question." In *Nickey Chevrolet*, the administrative law judge did not consider determinative the discriminatee's failure to look for a job during the first 40 days after his discharge. In *Wright Electric, Inc.*, 334 NLRB 1031 (2001), enfd. 39 Fed.Appx. 476, 2002 WL 1358789 (8th Cir. 2002), although the discriminatee followed his regular method of obtaining employment by registering with the union hiring hall during the initial seven-week period when he was unemployed, the Board looked at his entire 24-quarter backpay period.

In both *Nickey Chevrolet* and *Wright Electric*, the discriminatees had in fact either registered with the state unemployment commission or the union hiring hall, so that they had made some effort to obtain employment. But in *I.T.O.*, the discriminatee did nothing, and the Board nonetheless found it inconsequential. Here, many of the discriminatees made no application for new employment until late November, almost two months after they were discharged; and several made their first applications in early December. In light of the fact that, thereafter, they diligently and reasonably made applications for new employment, and almost all became employed in December, I conclude that their search for new employment at any time within the last quarter is reasonable. I will not exclude from the backpay period the 2 or 3 weeks from the end of the 28 days (*I.T.O.*) or even the 40 days (*Nickey Chevrolet*) or seven weeks (*Wright Electric*) to the date when the discriminatees made their first search for work.

Strike Benefits

Another issue that was common to almost all the discriminatees involved strike benefits, which, with certain exceptions,[5] the General Counsel did not offset from gross backpay and which, Respondents contend, were a form of interim earnings that should have been deducted. During the strike against the Grosvenor, which began on September 27, 1996, and ended in early January 1998,[6] the Union paid strike benefits of $100 per week and some additional "strike donations"[7] to all the discriminatees, except Francisco Abreu, who of the 44 discriminatees in this proceeding was the only one who never joined the picket line. The strike benefits were paid by the Union's International office, from a per capita remitted by the Union from its members'

[5] Some discriminatees reported their strike benefits as self-employment earnings for income tax purposes. These were deducted from their gross backpay.

[6] I reject as pure speculation and surmise, supported by no hard evidence, Respondents' contention that the strike against the Grosvenor ended earlier and that the strike was converted by early 1997 to make a showing to the Disney interests that the Union was "willing and able to mount high-profile concerted activity in protest of another employer's action."

[7] The following donations were paid to all discriminatees except Abreu: $100, October 24, 1996; $100, November 1, 1996; and $77.91, November 22, 1996. Additional donations were paid to all discriminatees except Abreu, Matos, and Caban, as follows: $200, December 27, 1996; and $111, January 10, 1997.

dues payments to the International. The donations came from moneys contributed by other labor organizations and individuals, apparently in sympathy with the strike. The Union reported to the Internal Revenue Service strike benefits, but not donations, in 1997, on IRS Forms 1099-Misc. Fabian decided that showing up and picketing was the sole qualification for the strike benefit and donation.

In *Rice Lake Creamery Co.*, 151 NLRB 1113, 1131 (1965), enfd. as modified 365 F.2d 888, 893 (D.C. Cir. 1966), the Board stated:

> If the strike benefits received by the discriminatees constitute wages or earnings resulting from interim employment, they are proper deductions from gross backpay. If these sums represent collateral benefits flowing from the association of the discriminatees with their union, then the sums are not deductible. The burden of proving that the strike benefits constituted wages for picketing and thus were in the nature of interim earnings, was on Respondent.

The issue involves whether Fabian's requirement that the discriminatees show up to picket at least some time each week suffices to demonstrate that benefits are not collateral but are direct payments for the picketing and thus interim earnings that are deductible from the discriminatees' gross backpay. Although there is clearly some language in some decisions which supports the interpretation that, if payment is contingent on picketing, then the payment constitutes interim earnings, I conclude that the benefits are not wages or interim earnings. For example, in *Rice Lake Creamery*, 365 F.2d at 893, the court agreed with the Board's finding that the strike benefits were collateral, "flowing from the association of the discriminatees with their union," and, therefore, not deductible like wages or earnings resulting from interim employment, where, to qualify for the benefits, the discriminatees were expected to do some picketing. However, the court noted this was not an absolute requirement; that some discriminatees received benefits after the picketing terminated, and that the amounts were not "entirely" related to the hours of picketing.

Here, although showing up to picket appears to be an absolute requirement, albeit never announced to the discriminatees and unknown to them, there was no relation of the $100 payments or donations to the discriminatees' hours of picketing. Everyone received the same amount, no matter whether they picketed for a full seven-day week or one shift of four hours on one day, or whether they had interim employment or not. The uniform amount demonstrates that it was paid not for hours of works performed, but merely for the fact that the discriminatees, without any anticipation that they would be paid anything, supported the strike by showing up to picket. *Coast Delivery Service, Inc.*, 198 NLRB 1026, 1030 (1972).

In *ABC Automotive Products Corp.*, 319 NLRB 874, 877 (1995), the Board adopted the administrative law judge's recommendation that strike benefits should not be deducted as interim earnings where strikers received $100 per week and were required to be on the picket line one day per week. The judge relied on *Madison Courier*, 202 NLRB 808, 810 (1973), remanded on other grounds, 505 F.2d 391 (D.C. Cir. 1974), in which the Board stated:

> [T]here is no record evidence indicating that the receipt of strike benefits by the unfair labor practice strikers in any way interfered with their efforts to locate suitable interim employment. In the absence of such evidence we find that the claimants' right to receive backpay should not be diminished by the fact that the claimants picketed, attended union-sponsored training sessions, or received strike benefits roughly comparable to their take-home pay during the period of the Respondent's liability.

The judge found, as I do here, that there was no evidence that the receipt of the strike benefits "in any way interfered with their efforts to locate suitable interim employment." In fact, Fabian testified that the discriminatees would bring newspapers to the picket line and sit underneath a tree and read it. They would leave the picket line, go to an interview, and come back. They would come to the line late, reporting that they were out in the morning looking for jobs. In addition, the Union referred them to jobs while the strike was ongoing.

In *Glover Bottled Gas Corp.*, 313 NLRB 43, 45 (1993), enfd. 47 F.3d 1230 (D.C.Cir. 1995), cert. denied 516 U.S. 816 (1995), like here, a list of strikers was submitted to the union office each week, and strike benefits were then dispensed based on that list. The discriminatees were never told by their union what the requirements were for them to be eligible for strike benefits, despite the "conclusory" testimony by some discriminatees that they were paid for picketing or had to picket in order to receive strike benefits.[8] The administrative law judge found that strike benefits were collateral to union membership and support for the strike, based on "the totality of the circumstances."

The $100 strike benefit and donations had no relation at all to the earnings of the discriminatees when they were employed by the Grosvenor or to any service rendered by them on the picket line. There was never any contract between the Union and the discriminatees, either written or oral, in which the Union sought the services of the discriminatees to picket for a certain amount, or the discriminatees agreed to do so. The Union made no deductions for withholding or employment taxes. The discriminatees never completed sign-up sheets, daily logs, or other records showing when they picketed. The Union thus never treated these amounts as wages. The fact that in 1997 it sent the discriminatees Form 1099s indicates that these payments may have been reportable for income tax purposes, but nothing more, for the reasons adequately set forth in *Florence Printing Co.*, 158 NLRB 775, 781–782 (1966), enfd. 376 F.2d 216 (4th Cir. 1967), cert. denied 389 U.S. 840 (1967). *Superior Warehouse Grocers*, 282 NLRB 802, 803–804 (1987), relied on by Respondents to support its contention that the payments here were interim earnings, is readily distinguishable and, in fact, supports my conclusion of law. There, the individual was paid $3 an hour for organizational picketing. Had the discriminatees here been paid an hourly wage for their services, my conclusion would be different.

Even *Tubari, Ltd. v. NLRB*, 959 F.2d 451, 454 (3d Cir. 1992), a decision on which Respondents place major emphasis, gives no support to them. The court there cited *NLRB v. Madison Courier Inc.*, 472 F.2d 1307, 1313 and fn. 12 (D.C. Cir. 1972), in which the union paid the discriminatees strike benefits "roughly comparable" to their weekly take-home pay, requiring them to be available to picket and other strike-related duties for two hours per day, six days each week. In *Tubari*, 959 F.2d at 456, the court found that the *Madison Courier* court's assumption that the union's payments were benefits, rather than wages, was "completely understandable since the two-hour picketing stint, yielding wages "roughly comparable" to what the discriminatees previously earned, was hardly comparable to ordinary employment. As noted above, Respondents had the burden to prove that the amounts received from the Union by the

[8] Jules Josaphat testified: "At the beginning they would give the $100.00 to everyone. And then after a few months [probably in 1997] they make a schedule and you had to be there certain hours during the day." Robert Baity, however, testified: "This was not necessarily for walking on the picket line. That was just for being on strike. We had a fund that the Union has which is a strike fund, which parts of it are taken from the Union dues and then other parts are donations from other Unions that go into the strike fund that is given to all the strikers whether you're on the picket line or not."

striking employees were in the nature of pay for interim employment and were not benefits for their support of the strike. Respondents did not meet this burden.

Because the strike benefits in *Tubari* were stipulated to be interim earnings, and I have found that they are not, and because it was conceded in *Tubari* that the discriminatees there did not search for other employment during the seven and one-half hours that they were required to picket each day, and I find that there was no prohibition deterring the discriminatees here from searching for other employment, and in fact most did, *Tubari* is irrelevant to the issues in this proceeding. It is also irrelevant because Board law, as shown above, does not require discriminatees to look for employment immediately upon their unlawful discharge. Even if *Tubari* were relevant, I am bound "to apply established Board precedent which the Supreme Court has not reversed." *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), cited in *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984).[9] I conclude that all strike benefits and donations are not interim earnings and, except as already credited in the Compliance Specification, shall not be deducted from the discriminatees' backpay.

Respondents' Expert Testimony

In addition, because I have held that the discriminatees had no duty to search for employment immediately upon being discharged, much of Respondents' proof concerning the availability of employment in the Orlando during late 1996 is irrelevant. Respondents attempted to demonstrate, through an expert and other witnesses, that, if the discriminatees increased their searches for employment, they could have essentially been employed at any time they wanted, thus filling in on all weeks and months that they were not employed and (presumably) obtaining employment that would have paid more than they earned. I did not find that testimony compelling, particularly because it was general, relying on statistics, which are often misleading, and was not specifically related to the availability of the full-time jobs that the discriminatees testified that they had applied for, and during the period that they were initially applying, from early October, a period that, according to one of Respondents' witnesses, was, until Christmas, "notoriously slow." ("[W]hen the kids go back to school [September] occupancy levels would drop."

Furthermore, although there may have been many job opportunities in Orlando, a large metropolitan area with a land area of 3,490.9 square miles,[10] the issue is not whether there are jobs far distant[11] from where this somewhat elderly[12] and non-English speaking group could travel by public transportation. The issue is whether there was some evidence that proved that these discriminatees did not make a reasonable effort to obtain jobs of the kind that the Grosvenor discharged them from. The issue is whether an applicant for employment who cannot recall her address, as one of the witnesses in this hearing could not, was the type of person that a particular employer would hire. The mere "existence of job opportunities by no means compels an inference that the discriminatees would have been hired if they had applied." *Delta Data Systems Corp.*, 293 NLRB 736, 737 (1989).

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[9] Respondents concede that none of them reside or conduct business within the jurisdiction of the Third Circuit.

[10] MSN Encarta Premium, http://encarta.msn.com/encyclopedia_761564744_1/Orlando.html.

[11] Many of the Spanish-speaking discriminatees lived in Haines City, 30 or 40 miles distant from the Grosvenor, which was 10 to 15 miles from the Disney main gate and 5 to 10 miles from International Drive, where there were many hotels.

[12] Davis was 62 years old; Day, 62; Gillaspie, 60; Jackson, 68; Malagon, 69; Preval, 65; Rankin, 61; Smith, 67; and Williams, 62. Another 16 discriminatees were older than 50.

The issue is whether prospective employees, who were just fired as a result of a labor dispute, would be welcomed by employers which were trying to avoid labor disputes. In this respect, the testimony of Jane Peterson, the Grosvenor's Director of Human Resources, that an applicant would never be handicapped if it was known the applicant had been discharged due to a labor dispute, including a strike, is contrary to the wisdom contained in 344 volumes of the Decisions and Orders of the National Labor Relations Board. It is also contrary to the Grosvenor's unfair labor practices in their treatment of the discriminatees in this proceeding. Donna Smithberger, Director of Human Resources at the Caribe Royal All Suites Resort, stated that she would have had no problem hiring someone who had been involved in a labor dispute; yet, it took nine months for her hotel to hire discriminatee Abreu, and he was not even an active participant in the strike or picketing.

The issue is whether prospective employers, despite the legislative mandate of the Age Discrimination in Employment Act, 29 U.S.C. §621 (1967), would willingly hire an older applicant[13] or whether, when faced with two applicants, one of whom spoke and read English and the other did not, an employer would prefer the English-speaking applicant. Not even the newspaper advertisements serve a probative purpose. There was no identification of the address of the employer and whether the job had already been filled by the time the advertisement was published, nor was there proof that any particular discriminatee would have been hired had she or he applied for that particular job. *Arlington Hotel Co.*, 287 NLRB 851, 853 (1987), enf. granted in part, denied in part 876 F.2d 678 (8th Cir. 1989);[14] *Airport Services Lines*, 231 NLRB 1272, 1273 (1977), enfd. mem. 589 F.2d 1115 (D.C. Cir. 1978). In short, there are so many variables in an employer's choice of a prospective employee that this type of generalized testimony gives the trier of fact little help. *Taylor Machine Products*, 338 NLRB 831, 832 (2003), enfd. 98 Fed.Appx. 424, 2004 WL 1088245 (6th Cir. 2004); *United States Can Co.*, 328 NLRB 334, 343 (1999), enfd. 254 F.3d 626 (7th Cir. 2001); *Food & Commercial Workers Local 1357*, 301 NLRB 617, 621 (1991). I generally reject it.

Credibility

Having heard each of the discriminatees testify, and having observed them carefully, I am persuaded that, except for a few witnesses, discussed below, each testified truthfully and, again with some exceptions, also discussed below, accurately. Despite the fact that they signed or submitted to the Region Search for Work Reports on which they listed their attempts to gain employment, many were not filled out completely, due for the most part to the fact that many discriminatees do not speak or read or write English.[15] Some of the Reports were filled out by relatives. Some were completed by Fabian, who did not understand the significance of the documents and, once a discriminatee indicated that she or he had been hired, wrote in only the successful job application, thinking it unnecessary to write all the places that the discriminatees had actually made application prior to obtaining employment. Although the Reports asked for all the places where the discriminatees searched for work, Fabian merely asked the discriminatees to give her "a place where you have gone so they know that you are looking for work." Finally,

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[13] In order to prove that she preferred hiring senior citizens because they are more reliable than younger workers, Smithberger falsely inflated the percentage of her senior (65 years or older) full-time employees to 10–15 percent, whereas the true figure was 2 percent.

[14] Upon remand, 297 NLRB 436 (1989), the Board accepted the decision of the court only as "the law of the case."

[15] Abreu, Alvarez, Caban, Carranza, Delgado, Deneus, Desir, Febles, Israel and Lidia Hernandez, Javier, Jimenez, Jules and Therese Josaphat, Louisius, Matos, Meradin, Ovince, Preval, Quevedo, Ryland, and Viscaino-Hernandez.

although she wrote that the discriminatees were on the picket line, she did not intend that they were unable to work or search for work.

In addition, many of the forms were submitted to the Region late, long after the attempts for employment were made. Thus, three or four or more quarters were filled out and submitted at the same time; and pertinent information was omitted. I found truthful and have credited the testimony of most of the discriminatees, who stated at the hearing that they had made other efforts at obtaining employment, in addition to those stated on the forms, even though some of them could not then recall the specifics of the establishments to which they applied. "It is well established that employees are not disqualified from backpay merely because of poor recordkeeping or uncertainty as to memory." *Hickory's Best, Inc.*, 267 NLRB 1274, 1276 (1983), enfd. mem. 737 F.2d 1206 (D.C.Cir. 1984).

Some General Principles of Law

Throughout Respondents' briefs and motion papers, they argue that the discriminatees had the duty to seek jobs which paid as much as they had earned at the Grosvenor. Respondents are incorrect. There is no "substantially equivalent earnings" test in Board law, and, in particular, the court's decision in *Tubari* holds nothing of the sort. Rather, the court wrote, 959 F.2d at 454:

> The type of work the employee must seek depends upon his or her abilities. Generally, the employee must seek interim employment "substantially equivalent" to the position of which he or she was unlawfully deprived and that employment must be suitable to a person of like background and experience to the employee. *NLRB v. Madison Courier Inc.*, 472 F.2d 1307, 1318 (D.C. Cir. 1972) . . . (citing *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d 569, 575 (5th Cir. 1966); accord *Standard Materials, Inc. v. NLRB*, 862 F.2d 1188, 1192–93 (5th Cir. 1989).

Thus, in this Decision, I am guided by the following principles of law: To be entitled to backpay, the discriminatees must make reasonable, honest, and good-faith efforts to secure interim employment. *Millennium Maintenance & Electrical Contracting, Inc.*, 344 NLRB No. 62, slip op. p. 2 (2005); *Chem Fab Corp.*, 275 NLRB 21, 21 (1985), enfd. mem. 774 F.2d 1169 (8th Cir. 1985); *Electrical Workers IBEW Local 3 (Fischbach & Moore)*, 315 NLRB 1266, 1266 (1995), citing *Mastro Plastics*, 136 NLRB 1342 (1962), enfd. in relevant part 354 F.2d 170 (2d Cir. 1965) cert. denied 384 U.S. 972 (1966). The law does not require that the search be successful. *Millennium Maintenance*, supra; *Chem Fab Corp.*, supra. Respondents have the burden of proving that the discriminatees did not seek or refused to accept suitable employment. *Lundy Packing Co.*, 286 NLRB 141 (1986), enfd. 856 F.2d 627 (4th Cir. 1988). "Uncertainty in such evidence is resolved against the respondent[s] as the wrongdoer[s]." Ibid. They do not meet their burden of proof by presenting evidence of lack of employee success in obtaining interim employment or of low interim earnings. *NLRB v. Miami Coca-Cola Bottling Co.*, supra, 862 F.2d at 575–576.

The General Counsel's Motion for an Adverse Inference

In an after-hearing motion, the General Counsel requested an adverse inference and an order striking those portions of Respondents' brief which, according to him, misrepresented the record regarding the discriminatees' weekly hours of work in 1996. The nub of the dispute is that Respondents claim that certain discriminatees did not mitigate their damages, because they accepted interim employment at jobs that they were regularly scheduled to work less than 40

hours per week, whereas they regularly worked at least 40 hours per week for the Grosvenor in 1996.

Respondents claim that the determination of hours worked is readily ascertainable: one computes weekly pay by dividing the total gross wages paid by the Grosvenor in 1996 by 39, the number of weeks prior to the September 30 discharges of the discriminatees. Then, one divides that figure by the hourly wage. The result is the number of hours worked each week, and Respondents claim that their computations showed that virtually all the discriminatees were working 40 or more hours. Compliance Officer Karen Marksteiner disputed that computation on the first day of the hearing, testifying that Respondents had failed to provide any of the Grosvenor's payroll records and that Respondents' computation was incorrect because the earnings might have included bonuses and overtime pay. The General Counsel's motion adds to that premium overtime pay, holiday pay, and reporting pay; and room attendants were eligible for cleaning bonuses based on the number of rooms they cleaned, and maintenance workers were eligible for turnabout pay.

Respondents were thoroughly familiar with the claim of the Counsel for the General Counsel, who made known that "[o]ne possible issue will be whether the workweek was a 40-hour workweek" and that the "payroll records would show the number of hours per week that the employees [at] Grosvenor worked immediately preceding the back pay period and through the back pay period." The General Counsel had earlier subpoenaed the Grosvenor's payroll records. I advised Respondents' counsel that, if there were going to be an issue concerning the number of hours worked weekly, he should file his petition to revoke as early as possible. He stated that he knew what his options were, to file a motion or to produce the records, yet did neither. Nor did Respondents introduce evidence from the Grosvenor's managers or representatives regarding how many hours per week the discriminatees worked before being discharged, or from 33 of the 34 discriminatees who testified.

The General Counsel requests the following relief: (1) an adverse inference that the payroll records would not have supported Respondents' position that the discriminatees regularly worked 40 hours per week for the Grosvenor in 1996, and (2) an order striking Section VI of Respondents' Reply Brief and the supporting Appendices which computed the weekly hours of the discriminatees, as set forth above.

The importance of the motion for the General Counsel rests on his contention that a number of discriminatees accepted jobs where they worked 24 or more hours, which would make them full-time employees under the Grosvenor's handbooks and the collective-bargaining agreement that the Grosvenor unilaterally imposed on its employees in violation of the Act. Thus, the General Counsel contends that they accepted employment substantially similar to what they would have had, had they not been discharged by the Grosvenor. Respondents, on the other hand, in computing that the discriminatees were employed at the Grosvenor for full 40-hour weeks, contends that the law required the discriminatees to obtain interim employment where they would receive substantially equivalent earnings, which, as held above, is not the law.

But it is good law that a discriminatee may not mitigate her or his damages by accepting interim employment that is not "substantially equivalent" to the work performed before, and Respondents' withholding of the Grosvenor's payroll records makes impossible a comparison of the work performed for the Grosvenor before and the interim work. To the extent that Respondents contend that certain discriminatees accepted part-time work, that argument must fail, because Respondents have failed to produce the documents that support their contention that the interim work was for fewer hours than the work for the Grosvenor. "Substantially

equivalent" requires a comparison between what the discriminatee was doing, when employed by the Grosvenor, and what the discriminatee's new job was. In addition, Respondents' failure to ask any discriminatee, other than Montgomery, for the hours worked for the Grosvenor before the discharge, and the failure to ask any of the Grosvenor's representatives what were the hours of work of the discriminatees before their discharge leads to the logical inference that Respondents were seeking to conceal facts adverse to Respondents' interests.

Respondents' opposition to the motion argues only the logic of its arithmetic formula and the law of mitigation. It does not otherwise justify Respondents' failure to comply with the General Counsel's subpoena or to ask the representatives of the Grosvenor or even the discriminatees about their hours. The General Counsel's motion is granted. *McAllister Towing & Transportation Co.*, 341 NLRB No. 48, slip op. at 1–5 (2004); *Daikichi Sushi*, 335 NLRB 622, 622 (2001).

Discriminatees Sepulveda, Maria Hernandez, and Norma Jimenez

Three discriminatees did not appear at the hearing. The Region was unable to locate Adriana Sepulveda, nor were Respondents. *Starlite Cutting*, 280 NLRB 1071 (1986) (*Starlite I*), provides that her backpay shall be placed in escrow with the Regional Director, to be held for a period of one year, that period to start either when Respondents comply by depositing the backpay into escrow or on the date the Board's Supplemental Decision and Order becomes final, including enforcement, whichever is later. *Starlite Cutting*, 284 NLRB 620 (1987) (*Starlite II*). Absent Sepulveda's showing by a preponderance of the evidence that there were compelling reasons to justify her failure to come forward during that period, Respondents shall not remain obligated for the gross backpay amount specified for the discriminatee after the end of the 1-year escrow period.

Respondents were, however, able to find Maria Hernandez and Norma Jimenez and served them with subpoenas duces tecum. Maria Hernandez appeared with her mother, discriminatee Lidia Hernandez, on the day that they were initially scheduled to testify, November 15, 2004; but they had to leave suddenly when they received word that Lidia's mother was ill in Mexico. Respondents' counsel agreed to delay their testimony so they could travel to Mexico, with the expectation, and even representation, that they would return in time for the December trial session. They did not, and they were then scheduled to testify in January. Maria Hernandez failed to appear on January 20, 2005, the day that she was rescheduled to testify, as did Norma Jimenez; and Respondents moved to strike their claims for backpay.

Starlite I gives an absent discriminatee an additional year to appear at a compliance hearing and be examined, as Respondents did throughout this proceeding, about the discriminatee's effort to mitigate the backpay liability. Indeed, perhaps regarding these two discriminatees, Respondents wanted to argue that, under *Hoffman Plastics Compounds, Inc. v. NLRB*, 535 U.S. 137 (2002), they were illegal aliens and thus entitled to no backpay at all. These two discriminatees' failure to appear, pursuant to the agreement of at least one to do so and the obligation of both to do so by the subpoenas served on them—indeed, the two could have arranged their days of hearing—prevented Respondents from an opportunity to prove their position. Both *Starlite I* and *II* make clear the Board's awareness that its proceeding must at some point come to an end. As it wrote in *Starlite I*, 280 NLRB at 1072 fn. 4, "the law favors repose"; and the denial of this motion, giving these two discriminatees, who offered no reason for their failure to appear, yet another chance to attend yet another hearing, only to fail to show up again, might unnecessarily delay the final determination of this proceeding.

There is little legal authority. *L'Ermitage Hotel*, 293 NLRB 924 (1989), enfd. mem. 917 F.2d 62 (D.C.Cir. 1990), cert. denied 501 U.S. 1217 (1991), relied on by the General Counsel, is distinguishable. First, the administrative law judge found, at 929, that "[t]here are nine discriminatees who have not been located." Although the judge recited that the employer had learned the whereabouts of the four named discriminatees from prehearing discussions with other discriminatees, he noted that "the record contains no evidence of this." Thus, in that context, with the discriminatees not being found and there being no evidence of their being available to appear at the hearing, *Starlite I* was properly invoked and utilized. In *Schnabel Associates*, 291 NLRB 648 (1988), Ronnie Messer, who had been subpoenaed by the General Counsel, did not appear. The administrative law judge extinguished his claim for failing to cooperate with the Region during the compliance proceeding. Id. at 655. However, the Board noted, Id. at 648, fn. 1, that the employer did not except to the Judge's decision to strike Messer's claim and adopted the Judge's decision on that basis alone

In *Beckley Belt Services*, 289 NLRB 1179 (1988), the Board applied *Starlite I* where a discriminatee failed to appear at the compliance hearing despite being served with a subpoena by the General Counsel, recognizing that the employer deserved "an opportunity to cross-examine" the missing discriminatee. Id. at 1179. More telling is *Electric, Inc.*, 335 NLRB 315, 315 (2001), in which the Board wrote:

> The record also shows that the Respondents knew where the claimants were and how to contact them, because the Respondents had made telephonic offers of employment to both. Notwithstanding that knowledge and the proximity of the hearing to the employees' place of residence, the Respondents made no effort to procure the employees' attendance at the hearing, either by request or subpoena. In those circumstances, the escrow procedure used primarily in cases where discriminatees are missing or fail to respond to a subpoena by one or both parties is not warranted.

From this quotation, it appears that the *Starlite I* procedure is to be invoked not only where the discriminatees cannot be located but also where, as here, the discriminatees fail to respond to properly served subpoenas. I will thus deny Respondents' motion and apply the escrow remedy to Maria Hernandez and Norma Jimenez.

I turn now to the remaining 41 discriminatees.

Francisco Abreu

Respondents do not challenge Francisco Abreu's backpay claim of $11,917.67, as stated in the Compliance Specification.

Andres Alvarez

Respondents, relying on *American Navigation Co.*, 268 NLRB 426 (1983), contend that Alvarez willfully concealed his interim employment from the Regional Office and should be denied all his backpay. During the course of a Board proceeding, the Regional Office's Compliance Office attempts to continue communications with all the alleged discriminatees, sending them a form captioned "Claimant Expense Search for Work, and Interim Earnings Report" (Search for Work Report), which has in the upper right-hand corner spaces for the filling in of the quarter of the year for which the report is filed, and below, a space for the employee's name and current address. The name is normally typewritten in by the Region, as is the case number and case name below that. In Part I are spaces for three entries: (1) State, private, and

union employment services where the employee registered for work; (2) search for employment; and (3) all periods when the employee was unable to look for work. On the other side of the page is Part II. That asks for (1) all expenses related to looking for work; and (2) records relating to any job the employee held, including the dates, name and address of the employer, job title, gross weekly pay, and reason for leaving the employer. Written in bold type on the face of the form is the following:

> It is important that you maintain records concerning your interim earnings and expenses, your search of work, and your availability for work during the entire period of time until your backpay period of entitlement has been resolved. Additional copies of this form are available from the Regional Office. Your failure to truthfully report to the Board all interim earnings or other information affecting your backpay may result in partial or complete denial of any backpay which may be due you in this matter.

Whether employees read this warning is unclear. In fact, according to Compliance Officer Karen Marksteiner, it is not an absolute that the discriminatees return those forms; often the employees do not even reply to the Compliance Officer's request to fill in the form, and quarters go by without the return of anything. ("It's certainly helpful to get them. If they are complete, fine. If they are not, they can return information in different formats.") In this proceeding, it is clear that, at least for some employees, they did not respond each quarter and then sent in, in one batch, reports for numerous quarters. That delay in filling out the reports frequently results in the inaccuracy of the reports. Employees simply do not recall all the information because of the lapse of time. One method of ensuring the accuracy of the Compliance Specification is the requirement that the employees authorize the Compliance Officer to seek information about their earnings directly from the Social Security Administration. The Social Security Statements show all the earnings reported by the employees' interim employers, typically on W-2 forms, as well as earnings reportable on Forms 1099, and individual self-employment earnings reported by the employee.

Although Alvarez worked during the entire backpay period, he reported on the Board's Search for Work Reports none of his interim earnings. In fact, he wrote nothing on the back side of any of the Reports that he submitted; and the record does not make clear that he even looked at that side of the form. In addition, even if he did, it is not clear that he understood what was being asked for. He was born in Cuba and did not attend school after second grade. He testified with the aid of an interpreter. On the other hand, he does have some limited command of English. At the beginning of his testimony, he began to answer a question, before that question had been fully translated. In addition, I found that he understood at least some English words as they were being spoken by counsel and me. On the other hand, his expression was blank enough that he did not indicate full comprehension of the English dialogue.

Although he testified that he did not read English, he had enough comprehension of the English language to answer questions on the face of the Report; and his answers indicated that he had at least some comprehension of what kind of information the Report was looking for. Thus, on the third item, asking for any reason that he was unable to work, he answered, in his own handwriting "Full Pick Line" or "Full time pick line" for the third quarter of 1996 and the second and third quarters of 1997. In addition, he wrote "not working" in the second item, search for employment, for the second quarter of 1997. Beginning with the third quarter of 1997 through the first quarter of 2000, although he reported the unions he went to in the first item, he added "no work." Because that first item requested not only the employment services that he went to but also the companies when he was referred to work, his answer of "no work" seems to be

responsive, in the sense that he was not referred to any work by the unions. That was what he testified to when asked by Respondents' counsel.

I do not, therefore, find that his answers to the first item indicate a willful misleading. But he clearly, in his answers, "not working" and "no workers," which he inserted once, intended to convey the idea that he was not working, when he obviously was. He began to work in the last half of 1997 for Diamond Transportation, where he moved cars at the Orlando airport. He worked there, 40 hours a week, for about one and one-half years, until early 1999. He worked after that, too, but the record is not entirely clear. He worked for Trim-Pak Corporation in March 1999 and worked there at least through June 2002, according to Trim-Pak's records, but his Social Security Statement indicates that he worked there only from 1999 through 2000. That Statement also records that he also worked for Gevity HR III LP and First Watch Enterprises Inc. from 2000 through 2002, and one or both could be the same as Trim-Pak, which has his attendance record through June 2002. He also testified that he retired when he reached the age of 62 years in December 1999 and that he began to work only five or five and one-half hours a day, because he would otherwise lose some of his Social Security benefits;[16] and that he did this for three or four months, and then left Trim-Pak. Trim-Pak's records seem to substantiate a cutback of hours from 40 to about 25 or 30 hours, starting in September 2000, but Respondents' brief raises no issue about this.

Whatever his work history may have been, he had a work history that he did not reveal on his Search for Work Reports. His answer that those were "mistakes" was unconvincing. He conceded, at least at the hearing, that the forms sent by the Region asked him to provide information about his job search and employment. On the other hand, his lack of understanding of the Search for Work Report is exhibited by his inclusion of his Social Security benefits in answer to the first item on the face of the Report. That item clearly did not ask for the benefits that he was receiving. He reported on his tax return his income from Diamond Transportation, despite the fact that Diamond Transportation may have paid him off the books, because it did not report his earnings for income tax purposes. He also reported as income the strike benefits that he received from the Union. In other words, Alvarez was not a dishonest person.

That brings me to the Board's decision in *American Navigation*. Respondents' argument relies on the fact that Alvarez purposefully attempted to mislead the Region and conceal income. Here, although one could certainly take issue with the fact that Alvarez did not fill in his income on the back of any of the Reports, as he should (as the Compliance Officer testified, "In a perfect world that's what I get"), he did not attempt to mislead or conceal, as evidenced by the fact that he authorized the release of his information from the Social Security Administration. On the Social Security Statement received—although not dated or time-stamped by the Region, they reflect his earnings through 2002—all his earnings from the work not reported on back side of his Search for Work Reports are reflected. On that basis, the Compliance Specification accurately reflects all the earnings which Respondents complain were not revealed on his earlier Reports; and the General Counsel gave Respondents Alvarez's Social Security Statement and supporting documents in July 2000, well in advance of the hearing in this proceeding.

American Navigation, 268 NLRB at 428, requires a showing of willful perfidy and deception, a scheme for unjustified personal gain. *Performance Friction Corp.*, 335 NLRB 1117, 1119, fn. 11 (2001); *Allied Lettercraft Co.*, 280 NLRB 979, 983 (1986); *Rainbow Coaches*, 280

[16] An individual under 65 was permitted to earn $10,080 in 2000, $10,680 in 2001, and $11,280 in 2002 before incurring a reduction in his Social Security benefits for additional earnings.

NLRB 166, 186 (1986), enfd. as mod. sub nom *Rainbow Tours, Inc. v. NLRB*, 835 F.2d 1436 (9th Cir. 1987), cert. den. 487 U.S. 1235 (1988); compare *Toll Mfg. Co.*, 341 NLRB No. 115, slip op. at 3–5 (2004). I find no attempt to lie and no attempt to conceal. Because this is the sole basis of Respondents' defense, I conclude that Alvarez's correct backpay is $55,148.31, as stated in the Compliance Specification.

Robert Baity

Robert Baity had been employed by the Grosvenor as a banquet server for seven years. He applied for work at the Radisson in downtown Orlando on October 29, at Disney World[17] on November 29, and at the Royal Plaza on December 3, 1996. He was hired as an on-call banquet server at Disney World on December 3, 1996, and at the Radisson Twin Towers on December 9, 1996. He stopped working at the Radisson on June 30, 1997, because he was offered a full-time position at a new Disney World resort, the Coronado, where he started on July 13, 1997, and remained employed throughout the rest of the backpay period. From the first quarter of 1998, he earned more than he would have had he not been unlawfully discharged by the Grosvenor, which had no backpay responsibility from January 1, 1998.

In fact, Respondents do not question Baity's claim for the year 1997. Instead, they contend that Baity made an insufficient, inadequate, and untimely effort to mitigate his damages. However, Baity did start looking for work in October and made additional applications in November and December, which enabled him to obtain the full-time employment and resulted in Respondents owing nothing for the period from January 1, 1998 on. Those applications began to be made within one month of his discharge and, in accordance with my ruling above, were not untimely. Furthermore, Baity made more applications for employment than he listed on his questionnaire ("I know there were other places that I know that I visited that I don't see on this. I obviously didn't keep as good of records as I should have. This is all that I put down on here.") Although Respondents belittle that testimony, Baity seemed to me to be sincere, truthful, and reliable. His Search for Work Report shows that he applied to the Radisson Twin Towers, the Contemporary Hotel and the Grand Floridian in April; and I find that he made other applications the quarter before. As he testified, he "need[ed] the benefits."

I thus find his search for employment reasonable, diligent, and adequate. The law does not require the highest standard of diligence or "success; it only requires an honest good faith effort" to find suitable employment. *NLRB v. Cashman Auto Co.*, 223 F.2d 832, 836 (1st Cir. 1955); *Arlington Hotel Co.*, 287 NLRB 851, 851 (1987), enf. granted in part, denied in part 876 F.2d 678 (8th Cir. 1989). Baity is not to blame for the fact that banquet and convention business drops off substantially in the latter part of December due to the holidays, because businesses and groups do not typically hold out-of-town functions in Orlando during that period. The Grosvenor fired him, perhaps at the wrong time, increasing its liability because Baity could not find employment to replace what the Grosvenor took away from him. I conclude that he is entitled to the full amount claimed for the fourth quarter of 1996. In doing so, I reject Respondents' alternate argument that his claim for the months of October and November should be denied, because he was picketing. That did not remove him from the labor market and does not automatically negate his right to reimbursement by Respondents. *NLRB v. My Store, Inc.*, 468 F.2d 1146, 1151 fn. 4 (7th Cir. 1972); *Florence Printing Co. v. NLRB*, 376 F.2d 216, 218–220 (4th Cir.), cert. denied 389 U.S. 840 (1967). I conclude that he is entitled to $25,653.52, as stated in the Compliance Specification.

[17] Disney World owns many hotels. Each application to Disney World is an application to all of its hotels.

Rosetta Brown

Respondents did not call Rosetta Brown as a witness and omitted mention of her in their principal brief. Only in their reply brief did they argue: "She made only a single application during the fourth quarter of 1996 and did not begin working until December 11, 1996, generating only $320.63 during that quarter." Adding her strike pay to that, Respondents conclude that the amounts fell far below the "substantially equivalent" standard under *Tubari, Ltd. v. NLRB*, 959 F.2d 451, which the Board has not followed, and thus her claim for that quarter, the only quarter for which backpay is claimed in the Compliance Specification, should be denied.

In giving the parties the right to file reply briefs, it was not my intention to permit them to raise utterly new arguments on which they had the burden of proof. It was Respondents' burden to prove that Brown did not mitigate her damages, *Lundy Packing Co. v. NLRB*, 856 F.2d 627, 629 (4th Cir. 1988); and Respondents did not meet their burden. Brown's work search form shows that she searched for work in November 1996. Because it shows no date in November and because Respondents have the burden of proving Brown's failure to mitigate, *Beverly California Corp*, 339 NLRB 776, 777 (2003), I find from their failure to establish the date that she searched on November 1, 32 days from the date of her discharge. She was hired for this job and worked at this position throughout the remainder of the 24 quarters of the backpay period. Based on the entirety of her work record throughout that period, I find that she made a timely application and conclude that her backpay is $2,480.05, as stated in the Compliance Specification.

Hector Caban

Hector Caban, a laundry attendant, applied for work at the Family Dollar store in October, at Winn Dixie in November, and at Las Palmas at Sand Lake Condominium Association (Las Palmas) on December 2, 1996. As I held above, that is a sufficient search for work. Although he testified that was hired as a maintenance worker at Las Palmas on the day that he applied for work, and his Search for Work report shows his rate of pay to be $520.00 biweekly, his Social Security Statement shows no earnings there until 1997. Respondents insist that $1,040 be credited as interim earnings in the fourth quarter. There is no record or testimony about when Caban was first paid. Furthermore, I find it unlikely that Caban walked in off the street, made an application, and immediately started work. Caban was not asked about when he started work in relation to when he applied for a job. Although the Social Security Administration can make a mistake, I will credit its Statement, in the absence of proof about when Caban was paid. Accordingly, I refuse to find that he had any interim earnings in the last quarter of 1996.

Caban worked at Las Palmas until June 1, 1998, when the employer decided to contract out its maintenance work and discharged him. He then looked for employment, applying to four employers, and was hired to a maintenance position by a fifth, Toys 'R' Us, on August 13, 1998. He remained there through the second quarter of 2001. His weekly earnings at Toys 'R' Us were initially lower than his earnings had been at Las Palmas, probably caused by the fact that it was a part-time position of five or six hours a day. He asked for more hours, but was not given them. Respondents complain that he should not have accepted a part-time job, but it seems that he had no choice of other employment. Part-time employment satisfies the duty to mitigate, absent a showing that full-time work was available. *Be-Lo Stores*, 336 NLRB 950, 950 fn. 1 (2001); *United States Can Co.*, supra, 328 NLRB at 348. Besides, in the third quarter of 1999, when his earnings at Toys 'R' Us dropped, he took a supplemental job at the Florida Mall. Finally, in light of Respondents' failure to produce its payroll records, I cannot compare his

hours at Toys 'R' Us with his hours at the Grosvenor. In sum, I find that he made a good-faith and reasonable effort to mitigate his damages during this period.

Caban was rehired at Las Palmas on March 6, 2000, and continued to work there throughout the remainder of the backpay period. By reason of his earnings at Las Palmas, there is no claim for backpay during 2000 and 2001, but the Compliance Specification claims $323.77 for the first three quarters and $249.05 for the last quarter of 2002, caused by Las Palmas's reduction of his hours from 40 to about 28 in June, 2002. Respondents contend that his backpay for 2002 should be denied: by accepting fewer hours, he failed to exercise reasonable diligence in obtaining a position substantially equivalent to the position from which he was discharged. I know of no Board authority that requires that result. In fact, the Board has held that a discriminatee who accepts suitable interim employment, even at a lower wage, has no continuing duty to search for a more lucrative job. *F.E. Hazard, Ltd.*, 303 NLRB 839 (1991), enf. denied 959 F.2d 407 (2d Cir. 1992); *Sioux Falls Stock Yards Co.*, 236 NLRB 543, 570 (1978). Here, Caban had suitable interim employment and, for a reason not of his own doing, his employer reduced his hours. I am not going to blame him for remaining on his job. I conclude that Caban is entitled to $9,109.49, as the Compliance Specification claims.

Gilberto Carranza

After being discharged, Gilberto Carranza, employed by the Grosvenor as a houseman, the person who supplies all of the necessary materials, such as linen, to the housekeepers, removes the garbage, takes the dirty linen to the laundry, and performs some general cleaning of areas such as the lobby. Generally, a houseman lifts objects that are too heavy for some of the housekeepers. In September 1996, he registered with International Alliance of Theatrical and Stage Employees, Local 631, AFL-CIO (IATSE). IATSE had collective-bargaining agreements with general contractors who set up trade shows at conventions in Orlando and who were required to use employees referred by IATSE, which maintained a referral list. There were four categories of employees on that list, starting with either new hire 1 or 2, the IATSE representative not recalling which came first, helper, and journeyman. An employee advanced from category to category upon obtaining 250 hours of work, and each advancement would result in a pay raise, the first category being paid at $10 per hour. Employees accruing 1,000 hours or more were journeymen, who received the highest wage rate.

Depending on the number of trade shows going on, it can take three or four weeks to get through one rotation of the list. As the IATSE representative described: "In most cases these people live hand to mouth and they can't afford to wait through the rotation list because of the way the jobs are structured as far as Journeyman ratio to Helpers and New Hires. You have to really be prepared to stay the course in order to be able to make a living at it." Once an employee accumulated enough hours to become a helper, he went to the bottom of that list. It took discriminatee Paschal more than one year to accrue the 1,000 hours needed for journeyman status. "[T]he first year is very difficult."

Carranza obtained sufficient work from IATSE in the last quarter of 1996 and the first quarter of 1997 that Respondents do not claim that he failed to mitigate. However, on April 24, 1997, he accepted a full-time job with CWI, a recycling company, as a heavy machinery operator operating heavy equipment on a loader to recycle metals, engines, oil, and anything that is not accepted at a landfill. Then he was trained to operate and did operate a wood grinder. He earned $9.25 per hour, worked a 40-hour week, plus 16–20 hours of overtime, which, Carranza testified, he had to work to meet his financial needs. He remained on the job for three years, until about March 14, 2000, when he decided to leave "because the job that I was doing

as an operator, I was earning very little. I was trying to make a little extra money so it was something that I had to do."

Carranza had been earning, admittedly with 16–18 overtime hours each week, almost $3,000 more than he would have had the Grosvenor not discharged him. In 1999, he made more. His decision to leave was not a good one. His attempt to obtain a better-paying job was not fruitful. After a half-year of looking, he had found nothing; and he called CWI, looking to return to work there. Unfortunately, CWI, which had written him a stellar recommendation, had no openings; and Carranza's further attempts to find a new job were not fruitful. Finally, CWI purchased a new wood grinder, and rehired Carranza on April 10, 2001. He continued to work at CWI through the remainder of the backpay period.

I am convinced that Carranza made a good-faith and diligent attempt to find a better-paying position, perhaps not as much as once a week from March 14, 2000, as he testified, but enough to satisfy the Board's requirements that he search for work. After all, the reason that he left CWI, as reflected in CWI's letter of recommendation, was to pursue other opportunities; and I believe that Carranza was sincere in his desire to improve himself. That does not mean that he was free to leave his well-paying job (at least, well-paying, $9.25 per hour, when compared to the $7.58 hourly rate he would have earned at the Grosvenor) and leave the bill with Respondents. The General Counsel contends that the Board does not require a discriminatee to retain interim employment unless it is substantially equivalent to the position unlawfully denied, citing *Lundy Packing Co.*, 286 NLRB at 145, for the proposition that a discriminatee may quit an interim position for any reason if the position is not substantially equivalent to unlawfully denied position. He then argues that Carranza's CWI position was not substantially equivalent to his former position with the Grosvenor, because operating a wood grinder at a recycling plant in no way resembles supplying linens to room attendants (housekeepers) at a hotel; and, therefore, Carranza had no obligation to retain his position with CWI.

Although I generally agree with the General Counsel's argument, it has a major difficulty: Carranza did not leave CWI to look for the kind of position that he had with the Grosvenor. Instead, the General Counsel correctly states that he searched for work at the Wal-Mart warehouse, the McLean warehouse, and other employers that employed heavy equipment operators. So he left a well-paying job as a heavy equipment operator to obtain a better-paying job as a heavy equipment operator. This was a move purely for personal gain, without any compelling justification, and constitutes a willful loss of earnings. *Glover Bottled Gas Corp.*, 313 NLRB 43 (1993), enfd. 47 F.3d 1230 (D.C.Cir. 1995), cert denied 516 U.S. 816 (1995); *Shell Oil Co.*, 218 NLRB 87 (1975), enfd. mem. sub nom. *Weitzel v. NLRB*, 551 F.2d 314 (9th Cir. 1977), cert. denied 434 U.S. 920 (1977). I conclude that Carranza's total backpay is $1,035.38, for the fourth quarter of 1996 only.

Dorothy Collier

Dorothy Collier was employed for 23 years by the Grosvenor as a laundry attendant. According to her Search for Work Report, she registered for work at the Department of Labor and Employment Security on October 13, 1996, interviewed with, was hired by, and began working part time for H & H Cleaning Services on October 14, 1996, and continued to search for work at 11 other employers, including 10 hotels, beginning on October 18 and continuing through the remainder of the fourth quarter of 1996. From the fact that she was paid strike benefits during the same quarter, coupled with the fact that her job at H & H Cleaning Services was only part-time, as reflected on her Report, Respondents contend, first, that she picketed full time, a fact not in evidence, and, second, that she accepted part-time employment because

"she preferred to walk on the picket line for far less remuneration than she would have received by obtaining 'substantially equivalent interim employment,'" a fact also not in evidence.

Quite simply, although she was subpoenaed to testify by Respondents, and although she did testify, she never stated anything even remotely related to the facts advanced by Respondents. I reject their contention. I find no basis to find that her acceptance of part-time work was a willful loss of earnings. In fact, from her Report, it appears that H & H Cleaning Services was the only employer that offered her a job. She mitigated her damages by continuing to search for a full-time position after accepting the part-time cleaning jobs within two weeks of being discharged by the Grosvenor. *Be-Lo Stores*, 336 NLRB at 950 fn. 1; *United States Can Co.*, 328 NLRB at 348 (1999). Viewed in the context of the entire backpay period, her mitigation efforts clearly displayed reasonable diligence. *Wright Electric, Inc.*, 334 NLRB 1031. In any event, Respondents did not meet their burden to prove that she did not mitigate her damages. I conclude that she is entitled to the full amount of $3,324.19 for the fourth quarter of 1996, the only quarter that Respondents contest, and that her full backpay is $5,611.55, as the Compliance Specification states.

Ella Mae Davis

Ella Mae Davis, a salad maker, was 62 years old when the Grosvenor discharged her and 70 when she testified. The Compliance Specification requests backpay only for the fourth quarter of 1966. Soon after, she retired. Respondents contend that Davis did not look for work, as evidenced by her Search for Work Report. However, she insisted that the Report did not contain her handwriting; and I find that she did not prepare it. As for her search for work, Respondents' brief relies on the fact that Davis testified that the only employer she "called" for a job was the Grosvenor. However, it ignores her testimony that she searched for work by going to "some places," namely, she "went to two or three hotels." Respondents make much of the fact that she also picketed extensively that quarter, but she testified that she did not search for work during the hours that she was picketing (she picketed from the morning until 2:00 p.m., Monday to Friday). I believe her testimony and find that Respondents did not prove that she failed to conduct a reasonably diligent search for work in the fourth quarter of 1996. I find her backpay is $2,308.33, as stated in the Compliance Specification.

Lindsey Day

Lindsey Day, a steward, employed by the Grosvenor for 12 years, was 62 years old when he was discharged and about 70 when he testified. He made an application for employment to Disney World in November 1996 and was hired on December 12. He held this position throughout the remainder of the backpay period. Respondents dispute only his claim for backpay of $2,029.37 for the months of October and November, and the first nine days in December of 1996, contending, based on different formulations, that Day should receive either $1,352.90 or, as amended in its reply brief, $351.46. As I held before, the Board looks at the entire backpay period, and here, except for the very beginning, 70 days, Day worked every quarter. From the beginning of 1998, he earned more than he would have earned at the Grosvenor, for which there is no backpay obligation alleged.

Respondents, however, question that one application is not enough to mitigate fully his damages. The record does not sustain its assumption that Day made only one application. When asked whether he listed in his Search for Work Report all the places that he looked for work, Day answered: "Well, I have found all the papers that I found, and I didn't know what I done with those papers. So, I couldn't put it down because I put the papers I don't know where." That indicates that he looked for employment at more than just Disney World. So does his

answer to another question: "Well, that's when I was hunting for a job and I was walking [on the picket line] because I just never got much funds." So, he was picketing at the same time that he was looking for employment. He was not, as Respondents contend, picketing exclusively, leaving himself unavailable for work at a substantially equivalent job,

On the basis of this record, I conclude that Respondents did not meet their burden of proving that Day did not mitigate. I conclude, therefore, that he is owed backpay of $4,935.73, as the Compliance Specification states.

Carlos Delgado

Carlos Delgado, a houseman, searched for work at the Caribe Royal on October 10, 1996, and registered for work at the hiring hall operated by the International Brotherhood of Teamsters, Local 385, AFL-CIO (Teamsters) in Orlando on October 11, 1996, as well with IATSE. He obtained some work that fourth quarter from IATSE, but apparently very little, or at least he accepted very little, because his earnings totaled only $224.55. Respondents contend that what Delgado was doing that quarter was picketing full time and not making an earnest effort to obtain employment. IATSE work, however, was not steady, at least for new hires. A typical convention contractor requiring 50 IATSE referrals would be filled with about 40–45 journeymen, and the rest would be split between new hires and helpers. When a contractor needed an employee, IATSE contacted the next person on the referral list, by cell phone or beeper. If the employee failed to respond within 60–90 minutes, IATSE contacted the next person on the list. The referral list consisted of about 700–900 employees, of whom 200 were journeymen, and rotated with each referral. So, if an employee missed a call, the union would go through hundreds of other employees before returning to that employee, taking some 3–4 weeks.

There were several reasons why one employee on the list might work far more hours than another employee on the list, although both started with the same seniority and qualifications. One of them may reject more jobs, one may be harder to contact, one may be referred to work outside the decorating field; and one may be specifically requested by a contractor even though he was not next on the list.[18] Although discriminatee Paschal earned $1,034.38 in 1996, others, such as Carranza and Rankin, earned less from IATSE than Delgado. In light of the fact that new hires do not obtain steady work, that their assignments are sporadic and the length of them a matter of luck, and that the convention business slows during the holiday season, I find that he reasonably mitigated his damages and will credit him with the entire claim of $2,843.44 for the fourth quarter of 1996.

The Compliance Specification excepts the first, second, and fourth quarters of 1997; and Respondents contest Delgado's claim that he searched for work in the third quarter of that year. His Search for Work Report shows that he searched for work at six employers during that quarter, and he testified that during this and the first two quarters of 1998, he also searched at a liquor store, Auto Zone, and Regal Boats, which hired him, but he worked there only one day because the resin hurt his eyes. That is a substantial search for employment. Delgado was not without work in the third quarter, all of it coming from IATSE; but Respondents complain that the amount of work was not enough, that others were receiving far more than Delgado. However, Delgado took himself out of the labor market for most of 1997, for which no backpay claim has

[18] In addition, as of July 1, 1997, IATSE Local 835 was chartered to service the trade show industry in Orlando. The record, however, does not make clear whether any of the discriminatees were affected by this change.

been made; and, I infer, remained at the bottom of the list of IATSE referrals. Thus, his low amount of work was understandable, and he should not be punished for it. I find, therefore, that he mitigated his damages during that quarter, for which the full amount of $2,018.74, as alleged in the Compliance Specification, is owing.

With Delgado again not working in the fourth quarter of 1997, his lack of work in the first and second quarters of 1998 becomes troubling. There was a sufficient showing that he searched for work in the third quarter of 1997, and he did some work for IATSE-contracted employers then; and he applied for work to six employers in the first quarter of 1998 and another five in the second, during which he finally obtained employment, about which more, below. But what happened to IATSE? I find it most unlikely not only that he was not called for work but also that he was called for work, and accepted nothing. He was simply out of the market for a while; he was not interested in work; and the applications were either not made or were a charade to make it appear that he was looking for work, when he was not. I find that he is entitled to nothing in the first two quarters or 1998.

Contrary to the position of Respondents, which is based on the fact that his Social Security Statement does not show any employment with American Diversified Services, I find that he did work for that employer, beginning on June 23, 1998, for three days per week through the first quarter of 1999. Delgado wrote this on his Search for Work Report and had no reason to lie about it, because his interim earnings would be deducted from any backpay due. He also testified that, during the first two quarters of 1997, he worked part time, two to four days per week, about three to six hours each day, at Diamond Transportation, although he did not report such earnings to the Board, nor presumably to the Internal Revenue Service, because the amounts were not reflected on his Social Security Statement. From his employment with both American Diversified Services and Diamond Transportation, it appears that Delgado was more interested in part-time employment, rather than a full-time job.

Even when he finally changed jobs and began working for Disney World on March 6, 1999 (he applied for it on February 20, 1999), where he remained throughout the remainder of the backpay period, he worked part time, at least as late as the third quarter of 2000. In most of the quarters, he earned more from Disney World in his part-time position than he would have, had he worked for the Grosvenor full time. Respondents do not object to the backpay claim of $73.53 for each quarter of 2000. Had Respondents produced their payroll records showing that Delgado worked 40 hours each week, I would have found that he did not mitigate his damages, because he did not seek full-time employment in the last two quarters of 1998. *Mastro Plastics Corp.*, supra, 136 NLRB at 1347. However, because I cannot compare the hours that Delgado worked then with the hours that he worked for the Grosvenor, I find that Respondents did not meet their burden of proving that Delgado did not mitigate his damages.

Accordingly, I will deduct from the Compliance Specification the backpay claimed for the first two quarters of 1998, a total of $6,612.34; and I conclude that Delgado is owed the remainder, $7,015.79.

Enoch Deneus

In light of Respondents' failure to challenge the Compliance Specification's calculations of the backpay due to Enoch Deneus,[19] I conclude that the backpay amount is $9,659.27.

[19] Respondents do challenge the failure to deduct the strike benefits as interim earnings. I have previously ruled that the benefits are not earnings.

Oslaine Desir

Oslaine Desir, a room attendant, first searched for work at Disney World in December 1996 and was hired at Disney World on January 3, 1997. She was discharged two and one-half months later, on March 22, 1997, having missed almost a week due to illness, albeit with permission from her employer, while still in her probationary period. Her next job, at Embassy Suites, started on May 1, 1997, and ended in early 1998, when she left to go to work for Preferred Brands, because she was not working enough hours. There, she worked off and on until 2001, putting salads into bags, placing the bags into boxes, and closing the boxes.

In 1999, she left the Orlando area to travel to Denver, Colorado, where she had a cousin. Desir worked for one employer there, where she earned $1,304.33, and then returned to her job at Preferred Brands. She was briefly laid off by Preferred Brands (then called Preferred Fresh Foods) and worked for La Quinta Inn late in 2000, but soon left there when she was recalled by Preferred Fresh Foods in 2001. She was again laid off by Preferred Fresh Foods in about September 2001, at the time of the World Trade Center tragedy; and she searched for work in Orlando but could not find a job. (Respondents admit that there was a drop of job opportunities following the 9/11 events.) She then moved back to Denver to find work because she could not find work in Orlando. She worked for McDonald's at the Denver airport from late August through early October 2002 and for a hotel for three days in October, but left because of an injury. She testified that she missed her children, who were still in Orlando, so she moved back to Orlando at around Christmas, 2002.

Respondents object that Desir, for whom the first and second quarters of 2002 were excepted from the backpay period, is also not entitled to any backpay for the fourth quarter of 2001 and the third and fourth quarters of 2002. In other words, Respondents' claim is that Desir did not look for work at all from October 2001 to the end of the backpay period. The record, however, makes clear that she worked at McDonald's; and when asked what she did from the time she lost her employment at Preferred Fresh Foods to the time that she obtained employment at McDonald's, she testified that "it was very difficult to find a job." She added that she kept on looking for work, but could not find any. That was the reason that she moved to Denver.

Respondents emphasize that Desir could not recall even one place that she looked for work ("Oh my God, I can't remember") and thus contend that she did not look for any; but her power of recall was not exactly what all people might want, being unable when she first testified to recall her own address. Despite her failure to recall clearly, I am convinced by her sincerity as she testified that she was not fabricating. ("But I really looked for work. And after looking a lot of works over here I could not find, that's the reason I went to Denver, to see if I could find some work. . . . And my cousin told me I would find work in . . . Denver.") She could not find work in the fourth quarter of 2001, and I will not exclude it. Having observed Desir as she testified, I find it neither unusual nor suspicious nor remarkable that Desir could not recall the details of her search for employment in 2001. *United Aircraft Corp.*, 204 NLRB 1068, 1068 fn. 4 (1973).

I also conclude that she continued to search for work when she was in Denver and did, in fact, find work in Denver in the third and fourth quarters of 2002. Respondents contend that the work was minimal, but I find that it was the best that she was capable of obtaining, ending only in October, when she injured her finger at Loews, an event that does not disqualify her from receiving backpay. *American Mfg. Co.*, 167 NLRB 520, 522 (1967). When she moved back to Orlando, albeit for personal reasons, she continued searching for work for the remainder of the backpay period, finally obtaining a job 10 days after the backpay period ended. I reject Respondents' contention that she should be denied backpay for these last two quarters. I

conclude, therefore, that Desir is entitled to backpay in the sum of $22,356.44, as stated in the Compliance Specification.

Aida Febles

Aida Febles, a room attendant, unsuccessfully applied to work at the Royal Plaza on September 30, 1996, but her application to the Embassy Suites on November 22, 1996, was successful. She worked there until June 17, 1997, when she was hired by Disney World, where she remained for the remainder of the backpay period. Respondents' claim that she should be denied backpay for the fourth quarter of 1996 has already been rejected. The Board does not require that she look for work immediately; she did, in fact, look for work on the day that she was fired and, again, within two months of the date of her discharge, and her work record for 24 quarters, upon being hired by Disney World, was continuous. *Wright Electric, Inc.*, 334 NLRB 1031.

While working at Disney World, Febles took a medical leave of absence from May 20, 2001 until she returned to work on July 17, 2001, a total of 57 days; and she received no wages during this period, but received disability payments beginning 28 days after the commencement of her leave. Respondents contend that, while it did not offer short-term disability benefits to its employees, employees could use paid time-off, such as vacation or sick days, to compensate them during their leave. Given Febles' 1987 hiring date at the Grosvenor, she would have qualified for "three weeks plus another two weeks and a day of personal time," or 36 days of paid vacation.[20] Respondents then subtract these 36 days (paid time off) from the 57 days she was out on medical leave and contend that she is not entitled to 21 days, or 3 weeks, of backpay during the period she was out on medical leave in 2001, relying on *Superior Export Packing Co.*, 299 NLRB 61, 65 (1990).

Respondents' argument is premised on the fact that Disney World's disability payments were not already credited to Febles as interim earnings. During the hearing, Counsel for the General Counsel raised the possibility that these payments had already been deducted as interim earnings, and I suggested that the parties should try to find out. That was the last that I heard of the matter; no further evidence was produced on this issue. Respondents bear the burden of proving facts that would eliminate or mitigate liability to Febles. *NLRB v. Brown & Root, Inc.*, 311 F.2d 447, 454 (8th Cir. 1963). That includes the amount and nature of her interim earnings. Ibid. Because Respondents failed to produce evidence that her interim earnings did not include her disability payments, I assume that the payments were included. In any event, doubts and uncertainties are to be resolved against the wrongdoing Respondents. *United Aircraft Corp.*, 204 NLRB at 1068. I, therefore, find that no reduction in her backpay is warranted and conclude that Respondents owe her $12,452.92 as backpay, as the Compliance Specification states.

Maria Gillaspie

Respondents do not contest the Compliance Specification's calculations concerning Maria Gillaspie.[21] I conclude that she is owed $5,067.53.

[20] The General Counsel argues that Febles would have had more than 10 years of seniority as of 2001 and would have been entitled to four weeks of paid vacation, as well as 11 paid personal days, for a total of 31 paid days. For the purpose of my conclusion of law, it is unnecessary for me to resolve this conflict.

[21] Respondents do challenge the failure to deduct the strike benefits as interim earnings. I have

Continued

Deborah Goodman

Deborah Goodman applied for work at seven employers between November 14, 1996 and November 22, 1996, and was hired at the Embassy Suites on November 29, 1966. She worked there, according to her Search for Work Report, until December 22 or 23, 1996. On January 1, 1997, she either applied for a job at Disney World or was accepted for employment, started there on January 22, 1997, and worked there through the rest of the backpay period. Respondents dispute her claim, unlike Febles, only for the period September 30, 1996 through November 14, 1996, agreeing that, beginning on November 14, "she made a reasonably diligent effort" to find employment. I reject Respondents' position that she had a duty to apply for interim employment before then, for the reasons already stated in rejecting its similar position regarding Febles. I thus conclude that the correct backpay owed to Goodman is as stated in the Compliance Specification, $15,797.39.

Israel Hernandez

Israel Hernandez, a houseman, registered for work at IATSE on November 21, 1996, and was referred for work on November 24, 1996. He continued to work for various employers through IATSE's referrals regularly for the remainder of the backpay period. Respondents dispute his claim for the period September 27,[?] 1996, through November 24, 1996, based on his failure to mitigate damages during this period, to wit, that he submitted only the single application for work referrals to IATSE during the fourth quarter of 1996 and made no other applications for work. For the reasons previously stated, I disagree. I note that, through IATSE, Hernandez received $10 per hour, 45 per cent higher than his wage of $6.90 when he was discharged by the Grosvenor. Although it was difficult to obtain attractive work, new hires received raises after every 250 hours; and he stayed with IATSE throughout the entire backpay period, increasing his pay and work opportunities throughout the following 24 quarters and earning in the last 20 quarters more than he would have earned, had the Grosvenor not fired him. Thus, his early employment, although not as much as Respondents may have appreciated, resulted in the reduction of Respondents' backpay obligation. I conclude that Respondents' objection is not well-founded, and Hernandez is entitled to the entire amount of $5,255.46, as stated in the Compliance Specification.

Lidia Hernandez

Lidia Hernandez, a room attendant, applied for work at Disney World in November 1996 and began work as a housekeeper on December 7, 1996. She earned only $418.80 that fourth quarter, and Respondents object to the Compliance Specification's claim that she is entitled to backpay for that quarter, based on her "obvious" failure to mitigate damages. I reject Respondents' position for the reasons previously stated. She applied in November and maintained, with certain exceptions, her employment at Disney World throughout the backpay period. In addition, I note that she did not search elsewhere for the justifiable reasons that she did not drive and had no transportation. The Union took her to make her application, and she could walk to her job at Disney World. A discriminatee should not be disqualified if transportation problems limit her search for work.

Respondents also contend that Hernandez is not entitled to backpay for the last three weeks of the fourth quarter of 1999, through the entire first quarter of 2000, and into the second week of the second quarter of 2000 (December 7, 1999 to April 15, 2000) because she was

previously ruled that the benefits are not earnings.

discharged for being late nine times and for leaving a key in the door of a room. This is not enough. As the Board held in *Ryder System, Inc.*, 302 NLRB 608, 610 (1991), enfd. 983 F.2d 705 (6th Cir. 1993):

> The Board has consistently held that discharge from interim employment, without more, is not enough to constitute willful loss of employment. *P*I*E Nationwide*, 297 NLRB 454 (1989), enfd. in pertinent part 923 F.2d 506 (7th Cir. 1991), and cases cited therein. A respondent must show deliberate or gross misconduct on the part of the discharged employee in order to establish a willful loss of employment. Here we find that the Respondents failed to show that Larry Elmore's conduct fell within that standard. Elmore may have missed several scheduled deliveries, but he committed no offense involving moral turpitude and his conduct was not otherwise so outrageous as to suggest deliberate courting of discharge. Without such proof, Elmore's discharge from ATS will not serve as a basis for tolling his backpay. [Footnotes omitted.]

I do not consider that her conduct deliberately courted discharge. Nor, apparently, did Disney World, which reinstated her, without backpay, and where she continued to work throughout the rest of the backpay period. Accordingly, I conclude that Hernandez is entitled to the full amount of the backpay sought in the Compliance Specification, $15,983.64.

Betty Jackson

Respondents do not contest that $14,789.40 is correctly due Betty Jackson as backpay, as set forth in the Compliance Specification.[22] I so conclude.

Mollie Jackson

Mollie Jackson, a room attendant, was 68 when discharged, had hurt her foot in a car accident before the strike began, had surgery on her foot in the fourth quarter of 1997, which quarter was excepted, and thereafter withdrew from the job market. She had some self-employment income during the fourth quarter of 1996 and during 1997, which has been deducted from her gross backpay. In light of Respondents' failure to oppose the backpay figures set forth in the Compliance Specification, I conclude that she is owed $10,274.61.

Flor Javier

Flor Javier, a room attendant, was hired by Disney World in November 1996,[23] started on December 7, 1996, and worked there for the remainder of the backpay period. Respondents dispute her claim for the fourth quarter of 1996, based on her failure to mitigate damages during this period. For the reasons expressed above, and particularly noting that she worked every quarter of the backpay period, I reject Respondents' position. *Wright Electric, Inc.*, 334 NLRB 1031. I conclude that her backpay is $12,254.20, as stated in the Compliance Specification.

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[22] Respondents do challenge the failure to deduct the strike benefits as interim earnings. I have previously ruled that the benefits are not earnings.

[23] Javier was not asked when she applied for the job. One of her Search for Work Reports shows that she was told in December that the All Star Resort, a Disney World hotel, was hiring and to wait for a call; a second shows that she was hired in November. I have chosen to credit the latter Report, relying on the advice of *United Aircraft Corp.*, 204 NLRB at 1068, that doubts, uncertainties, and ambiguities are to be resolved against the wrongdoing Respondent.

Margarita Jimenez

Like Javier, Margarita Jimenez was hired by Disney World in November[24] and started on December 7, 1996. For the reasons expressed above, and for the same reasons stated in my discussion of Javier, I reject Respondents' objection to her failure to search for employment until November. I conclude that her backpay is $22,365.01, as stated in the Compliance Specification.

Jules Josaphat

Jules Josaphat was already employed by the Grosvenor as a lobby attendant when he obtained a second job as a steward at the Hyatt in 1989. He worked for both continuously since then, working for the Grosvenor from 7 a.m. until 3:30 p.m., then showering and driving ten minutes to the Hyatt, where he worked from 5 p.m. to 1 a.m. (from 4 p.m. to midnight after the Hyatt changed his schedule during the backpay period). From the time that he was fired, through 1997, Josaphat did not work at any job during the hours that he had worked for the Grosvenor. He picketed, and the only money he received, other than from the Hyatt, was strike benefits. Respondents object that it has any backpay obligation for that period.

I disagree. Josaphat credibly testified that, when he first started picketing, he looked for a job, but some employers did not even accept applications, so he did not report them on his Search for Work Reports. Later, he learned that he should have written them on his Reports, and he did so. I find, then, that he did search for work in the first two quarters after he was discharged, even though he could recall the names of only two employers that he went to, that he made applications at Disney World in November 1996 and Westgate Village in January 1997, and that he applied for work at seven employers in the second quarter of 1997 and five employers in the third quarter of 1997, including at least one application each month during these quarters. I also find truthful that he registered with both the Teamsters and IATSE in October 1996.

Although he registered with the two unions, he seems to have had no interest in doing that work. He worked at not one job for IATSE, which the record shows was sending people out for jobs. But he should not be penalized for not accepting what was admittedly very spotty work, not completely similar to his prior work as a lobby attendant. Respondents rely on the fact that, four days after the Union called off its strike, about January 8, 1998, Josaphat applied for and was hired by Riutel Orlando, Inc., where he began working on January 18. Then, he cut back his work at Hyatt to accommodate the fact that he was again working two jobs. This, Respondents contend, demonstrates that Josaphat was not willing to work while the strike was going on. However, he made applications for work in each quarter through the third quarter of 1997. That he made none in the last quarter is not significant. As the Board stated in *Cornwell Co.*, 171 NLRB 342, 343 (1968):

> A discriminatee who has otherwise made reasonable efforts to seek out new employment is not required in each specific quarter to repeat job applications which from her past efforts she knows are foredoomed to futility in order to protect her claim of backpay for that particular quarter. Rather, the entire backpay period must be scrutinized to determine whether throughout that period

[24] Her two Search for Work Reports for the last quarter of 1996 are almost identical to those of Javier, even including the handwriting. I make the same factual finding as in footnote 24.

there was, in the light of all surrounding circumstances, a reasonable continuing search such as to foreclose a finding of willful loss.

Here, Josaphat was employed commencing in the first quarter of 1998 and throughout the remainder of the backpay period. Respondents had the duty to show that Josaphat did not seek full-time employment. They did not prove that any of the employers to whom Josaphat made application actually offered him a full-time position that he refused. Barring that proof, I will deny Respondents' claim that he failed to mitigate through 1997. Furthermore, his successful application in January 1998 to Riutel Orlando is sufficient to grant him full backpay for that quarter, and I will not exclude the first 18 days, as Respondents request.

However, Respondents are entitled to some setoff. Respondents do not dispute the legal proposition, espoused by the General Counsel, that earnings from a supplemental job that a discriminatee held before the unlawful discharge and maintained afterward are not deductible from gross backpay as interim earnings. But, here, because Josaphat could not obtain interim employment to replace the loss of his job at the Grosvenor, he increased his hours of work at the Hyatt during 1997 to cover his loss of income from the Grosvenor. The additional income from Hyatt, $4,777.36, albeit from a second job, is directly attributable to his effort to obtain earnings and make up what he had lost when he was discharged by the Grosvenor. Accordingly, it should be added to his 1997 interim earnings. His interim earnings for the year 1997 will therefore be increased $1,194.34 per quarter, and his net backpay will be reduced to the sum of $1,449.66 each quarter.

Respondents do not otherwise dispute Josaphat's backpay for the remainder of that quarter through part of the third quarter of 2001, but note that, beginning in September 2001, according to his own admission, he voluntarily eliminated one day of his work at Riutel Orlando, reducing his hours one-fifth each week, and his reduced hours continued through the remainder of the backpay period. Josaphat testified that he reduced his hours because he was just working too hard, that he did not want to work that hard anymore, and that working the two jobs had become too difficult for him at his age (he was then about 61). At a result of his reduction of his interim employment without compelling or justifying means, Respondents contend, relying on *KSLM-AM & KSD-FM*, 275 NLRB 1342, 1343 (1985), and *Medline Industries, Inc.*, 261 NLRB 1329, 1332 (1982), that his claim for backpay starting in September 2001 through to the end of the backpay period should be denied.

The General Counsel contends that, even though Josaphat reduced his hours, he averaged 23.8 hours in 2001 (rounded up to 24), and 26 hours in 2002 and thus would have retained full-time status had he been working for the Grosvenor in 2001 and 2002, because its collective-bargaining agreement, which it unilaterally imposed on the Union in violation of the Act, conferred regular status on unit employees who worked a regular schedule of 24 to 40 hours. That, however, did not establish the work week of an employee. I agree with Respondents' contention that the definition of "full-time" employee in the Grosvenor's handbook is simply the Grosvenor's cut-off point for receipt of certain benefits, such as healthcare coverage, and has nothing to do with Josaphat's obligation to mitigate.

Whether he would have retained full-time status at the Grosvenor makes no difference. The General Counsel did not compute its gross backpay claim of the basis of anything but Josaphat's 1996 gross wages, earned prior to his discharge. It was Josaphat's obligation to mitigate his damages at a job that was substantially equivalent to the job that he held at the Grosvenor. Josaphat never worked a full 5-day week, 8 hours each day for Riutel Orlando. He averaged 35 hours a week in 1998 and 31 in 1999 and 2000. His hours in 2001 represented a reduction of 24 percent from the prior year; and his hours in 2002 constituted a reduction of 17

percent from 2000, an average for the two years of about 20 percent, which is what Josaphat said was his reduction.

It may be justifiably argued that Josaphat should not be rewarded by his decision to work less and that Respondents should not be charged for Josaphat's determination that it was becoming too hard for him to work two full-time jobs. It may be argued with equal force that he should have reduced his work at his second job with Hyatt, rather than Riutel Orlando. On the other hand, Respondents' failure to produce the Grosvenor's payroll prevents me from comparing what hours Josaphat worked at Riutel Orlando with his hours at the Grosvenor. He may have worked more at his interim employment than he did at the Grosvenor. Accordingly, Respondents have not met their burden of proving that, by reducing his hours, Josaphat did not mitigate his damages. I decline to reduce his backpay from September 2001 to the end of the backpay period.

I conclude, in accordance with the foregoing, that the total backpay owing to Josaphat is $33,135.01.

Therese Josaphat

Respondents object to almost all of the backpay claim of Therese Josaphat, a room attendant and the wife of Jules Josaphat (Jules). First, Respondents claim that she is entitled to nothing for the fourth quarter of 1996 because she applied for employment to only one employer, Disney World, in November. In fact, according to her Search for Work Report, she also registered for work with IATSE and the Teamsters in October. In addition, because she understands far less English than Jules, he filled out the Reports for her. He apparently made the same errors of omission for her that he did for himself, omitting from her Reports the occasions that she went to employers, at least two of whom she named, to seek employment, only to be told that there was none available, so they did not give her an application to fill out. In accord with my prior ruling, she made a sufficient attempt to obtain interim employment; and I reject Respondents' objection, noting that she was employed throughout the entire remainder of 24 quarters of the backpay period. *Wright Electric, Inc.*, 334 NLRB 1031.

However, Respondents do not even agree that her consistent employment evidenced a good-faith attempt to obtain a job. Rather, they take issue with the claim for 1997, first, on the ground that she received strike benefits for "walking on the picket line for far less remuneration than she would have received by obtaining 'substantially equivalent employment.'" However, in light of the fact that the Union paid its strike benefits for merely appearing at the picket line, but not based on the actual time spent there, she performed no work at the picket line and received no wages. The second reason that Respondents contend should bar her from receiving backpay is that she made too few applications for work. She, however, in addition to those to whom she made applications in the last quarter of 1996, searched for work at three employers in January, four more in February, and two more in March 1997. At one of them, she applied a second time. She made two other applications in each of the following two months, one of them for a second time, and credibly testified that she continued looking for work throughout 1997 because she was not satisfied with the number of hours she was working at the two jobs she obtained that year at the Host Marriott (a joint venture with the Orlando Arena), in April, and the Royal Plaza, in May. With that employment, together with her applications for work, Josaphat exercised reasonable diligence in seeking employment in 1997.

Respondents next contend that she did not mitigate damages in 1998, because on December 28, 1997, she quit her part-time job with Host Marriott for, according to a personnel action form subpoenaed from the employer, "personal reasons." She testified, however, that she

was dismissed because there was "not enough work." I credit her testimony. The Host Marriott document is unreliable, because it was dated on April 24, 1998, reflecting, allegedly, a personnel action taken almost four months before. I specifically made known my qualms about the document and indicated to Respondents' counsel that, if he wanted to affirmatively prove that she quit, he should produce someone from Host Marriott. He did not do so. Having lost her job there, Josaphat had only her position with the Royal Plaza, for whom she worked at least 24 hours per week, sometimes 26, sometimes 30. When the hotel was busy, she worked 8 hours per day, but it was not busy all the time.

Respondents contend that she failed to mitigate her damages by not looking for a full 40-hour work week, such as the one that, it claims, she had when she was employed by the Grosvenor; but, as I held above, I infer that she did not have a full-time job. Furthermore, even had Respondents proved that the Grosvenor employed her regularly for 40 hours each week, I find that she did the best that she could. She had reasonably stable employment that often, even though hers seems to be a part-time job, required her to work full-time hours. I will not deny her claim for backpay for 1998. Similarly, I reject Respondents' contention that Josaphat is not entitled to any backpay for the remainder of the backpay period. From the time that she began to work for the Plaza Hotel, she earned as much as 90 percent, and no less than 82 percent, of what she earned had she remained at the Grosvenor. I will not, as a matter of law, find that she had a duty to seek employment that resulted in relieving Respondents of their gross backpay obligation. Acceptance of interim employment that is only part-time, or pays less than her former employment, does not necessarily establish that a discriminatee incurred a willful loss. *Associated Grocers*, 295 NLRB 806, 810 (1989). Furthermore, as noted above, the Board has held that a discriminatee who accepts suitable interim employment, even at a lower wage, has no continuing duty to search for a more lucrative job. *F.E. Hazard, Ltd.*, 303 NLRB 839; *Sioux Falls Stock Yards Co*., 236 NLRB at 570. I conclude that Josaphat's backpay is $21,093.98, as stated in the Compliance Specification.

Dorzelia Joseph

Respondents do not contest the backpay claim of Dorzelia Joseph.[25] I conclude that her backpay is $11,517.38, as stated in the Compliance Specification.

Paul LeBlanc

By the time of the hearing, discriminatee Paul LeBlanc, a bellperson, had died. Respondents contend that he should not receive any backpay for October, because he did not apply for a job in that month. Respondents' factual premise is correct, but omits that he applied to three employers in November, as well as registered with IATSE, because he worked for three exposition companies, beginning on November 24, 1996. I have previously ruled that a discriminatee who commences a search for interim employment within the last quarter of 1996 should not be denied backpay, particularly where, as here, LeBlanc worked continuously throughout the backpay period, until the final nine weeks of 1999 and the portion of 2000 before his death, which the Compliance Specification excepts. *Wright Electric, Inc.*, 334 NLRB 1031. I conclude that his estate is entitled to backpay of $2,956.70, as stated in the Compliance Specification.

[25] Respondents do challenge the failure to deduct the strike benefits as interim earnings. I have previously ruled that the benefits are not earnings.

Adisseau Louisius

Adisseau Louisius, a houseman, applied to work at Disney World on December 3 and was hired on December 7, 1996. He initially washed dishes but was transferred on December 28, 1996, to scrubbing frying pans with his hands, work that he told his supervisor he could not perform, and he was fired. In so finding, I give no weight to documents from Disney World to the effect that Louisius told his employer that he was "not a dishwasher" and walked out. First, the statement was hearsay. Second, Louisius denied making that statement. Third, he had been a dishwasher for the Grosvenor for six years, prior to becoming a houseman; and I find it unlikely that he would have made any such statement. Fourth, he had been washing dishes for Disney World for 20 days, and I find it unlikely that he would have made such a statement at that point of his employment. Accordingly, I find that he left for the reason that his employer changed the nature of his work. That does not compel the conclusion that he should be denied backpay for the quarter, as Respondents suggest; and Respondents did not establish a willful loss of earnings or gross misconduct. *La Favorita, Inc.*, 313 NLRB 902, 903–904 (1994), enfd. mem. 48 F.3d 1232 (10th Cir. 1995). It is equally well settled that a discriminatee does not incur a willful loss of earnings by quitting an interim job for a justifiable reason. *Florida Steel Corp.*, 234 NLRB 1089, 1092, 1094–1095 (1978), enfd. mem 598 F.2d 615 (4th Cir. 1979); *Mastro Plastics Corp.*, 136 NLRB at 1349–1350; *East Texas Steel Castings Co.*, 116 NLRB 1336, 1347 (1956), enfd. 255 F.2d 284 (5th Cir. 1958).

He next obtained employment at the Ramada Inn on January 4, 1997, but his employment ended on January 24, 1997, because the employer used a labor pool to supply workers, causing Louisius to be placed in a different position for which he was not qualified. In March, he was hired by the Hampton Inn, but laid off two weeks later because work was slow. A document in his file contains a handwritten statement and a check stub, apparently from the Hampton Inn, contains handwriting: "Who This Concern I Adisseau Louisius Left Job Because Because was Told To do Something that I wasn't Told to do. Like Clean up shit." Louisius cannot read, did not write this statement, and did not know who did. His cousin's child translated for him in filling out his Search for Work Reports. Although I find the Hampton Inn document more than suspicious, it is more unreliable than his own denial, which I credit. Even if I did credit the writing, his voluntary leaving the position would not, in any event, excuse Respondents from paying him backpay, because there is on the face of it some justification for his voluntary quit.

After he left the Hampton Inn, Louisius searched for work at two employers in April, two in May, and three in June 1997 and yet some others, including the Sheraton and a hotel behind the Sheraton. He next worked at the Holiday or Ramada Inn from July 18, 1997, until August 13, 1997, when he, according to his Search for Work Report, was laid off because of "No Hours." He searched again for work at three employers in September. (The fourth quarter of 1997 was excepted from the backpay period.) When the picketing ceased in early January 1998, he searched for work at a hotel in Sea World, the Sheraton, the Marriott, and another employer in Lake Buena Vista. (His last Search for Work Report was filed for the third quarter of 1997.) He next worked for the Westside Inn & Suites, starting May 4, 1998; and he also started working for the Sizzler restaurant in mid-May, where he was trying to obtain a position on the night shift. When that was unsuccessful, he quit Westside on June 7, 1998, to work full time at Sizzler because it paid $6 per hour (he later received a raise to $6.50), while Westside paid $5 per hour. But, again, on February 7, 1999, he quit, this time because a new supervisor had reduced his schedule from 40 hours to only 5 hours each day.

After he left, his child in Haiti became sick, so Louisius traveled there to take care of him; but his child died. He returned to the United States and started work on March 4, 1999, at Lott's Concrete Products, Inc., making cement blocks, but quit on July 14, 1999, because he found it

too difficult to "pack" the blocks. On August 13, 1999, he began working for J.F.A. Masonry Concrete, Inc. and remained in that position until November 4, 1999. He worked at yet other employers that year: Ronald Earl Kindell, P. H. Freeman Sons, Inc., Contract Personnel, Inc. and Creative Staffing Services, Inc. He moved to North Carolina in December, 1999 and worked for Food Lion for the rest of the backpay period.

Respondents complain that Louisius was willfully idle during a number of periods when he was unemployed. The first period is from September 27 to December 2, 1996, prior to his application to Disney World, but I am not convinced that this is so. His Search for Work Reports were filled out by Fabian, who testified that, when a discriminatee told her that he or she obtained employment, she would fill in only that successful application and the fact of employment and would not report any other applications. Louisius credibly testified that he also looked for a job in mid-November; so, in accord with my prior ruling, I will not exclude this initial period of unemployment immediately following his discharge by the Grosvenor. I note that, although Louisius's employment record is spotty, filled with gaps because of his dissatisfaction with his jobs or his employers' changes of work assignment, Louisius steadily tried to obtain employment and looked for work that would provide him with a living. He is credited with interim earnings for every one of the quarters of the backpay period.

The second period is five or six weeks from January 25 to early March 1997, after he was discharged from Disney World, when he refused to scrub pans with his bare hands. That was, as I held above, not gross misconduct; and he again looked for work. *La Favorita, Inc.*, 313 NLRB 902, 903–904. His reason for leaving the Ramada was that he was not qualified for the job and thus, I infer, could not perform his assignments. That, similarly, is not gross misconduct. Ibid. For almost four months, from late March to July 18, 1997, he had no work, but that resulted from the fact that he was laid off by the Hampton Inn. He did not quit. He left the Sizzler in February 1999, because the employer reduced his workweek. He left Lott's Concrete because he found the job too difficult. I reject Respondents' contention that I should pick out these periods of weeks and sometimes as much as several months and reduce Respondents' backpay liability. The Grosvenor fired him, and he should not be blamed for the fact that he could not find a suitable replacement for what he had lost by reason of the Grosvenor's violation of the Act.

The only period for which Respondents might have had a justifiable claim was in February 1999, when Louisius traveled to Haiti for about three weeks to care for his son, who passed away. But Respondents are liable for that period, too. Under the Grosvenor's handbook, because he had been employed for nine years when the Grosvenor discharged him, he would have had more than 10 years of seniority in 1999, and thus been entitled to 4 weeks of paid vacation, 11 paid personal days, and 5 paid bereavement days for a funeral outside Florida. Thus, the Grosvenor would have been obliged to pay him for these 3 weeks, and I will not exclude them from the backpay period. I conclude that Respondents owe Louisius backpay in the sum of $24,485.86, as stated in the Compliance Specification.

Martin Malagon

The Compliance Specification states that Martin Malagon is entitled to $74,304.62 as backpay. Malagon had worked as a full-time banquet server for the Grosvenor since Respondents purchased the facility in 1986 and had been the banquet manager for the prior owner for six and one-half years. He was 69 years old when the Grosvenor discharged him. The Compliance Specification excepted the third and fourth quarters of 1998 and 2000 and the rest of the backpay period commencing with the first quarter of 2001, when he withdrew from the job market. The General Counsel has proved that Malagon had surgery in early 1998 and was

unable to work for two weeks. However, because of his seniority with the Grosvenor, he would have been entitled to 4 weeks' paid vacation and 11 paid personal days; so that would have covered this brief period of disability, which I will not exclude.

Respondents oppose Malagon's claim on the ground that he did not adequately apply for jobs and that he did not pursue available jobs. I found Malagon to be honest and sincere and have credited his testimony. Thus, I find that he applied for positions as a banquet server at the Hotel Royal Plaza in November 1996 and Disney World in December, where he was hired as an on-call banquet server at the Disney Institute, beginning December 10, 1996. In early January 1997, he also applied for work at the Radisson Twin Towers and was hired there as an on-call banquet server on January 13, 1997. In the same quarter, he also inquired into positions at a Holiday Inn and another Radisson, as well as other hotels that he could not recall, but none of them gave him an application and all told him that they had no openings.

Servers at banquets in Orlando are either full-time or on-call. Hotels have a minimum number of full-time servers, such as what Malagon was when employed by the Grosvenor, who are essentially guaranteed that they will work at all of their employers' functions, as well as being assigned other tasks within their hotels. A larger number of servers are on-call, meaning that, when a hotel has a function and has need for more than its full-time servers, it will call its on-call servers to offer them employment for their banquets. Most banquet servers place their names on the on-call rosters for several hotels at once and do not work as full-time banquet servers dedicated to specific hotels, as Malagon had done for the Grosvenor.

So, Malagon, having been fired, filed or tried to file applications with hotels during the last quarter of 1996 and the first, maybe the second, quarter of 1997. He filed only two applications. The other hotels, however many, but only four at best, would not even take his application. And he received some work, but the work in 1997 amounted to only 41 percent of what he would have been earning had he remained in the Grosvenor's employ. The next two years, that percentage dropped to only 25 and 24 percent, respectively. Yet, at no time after the very early quarters did he look for additional employment. When asked whether he knew that there was a lot of work for banquet servers in Orlando, he answered "There probably was, but there wasn't for me. Not for a 70 year old going to apply for that type of work."

I recognize that, in determining the reasonableness of any individual's efforts, factors such as the individual's age, as well as skills, qualifications, personal limitations, and the labor conditions in the area must be considered. *Alaska Pulp Corp.*, 326 NLRB 522, 534–535 (1998), enfd. in part sub nom. *Sever v. NLRB*, 231 F.3d 1156 (9th Cir. 2000); *Laredo Packing Co.*, 271 NLRB 553, 556 (1984); *Mastro Plastics Corp.*, 136 NLRB at 1359. The difficulty with Malagon's claim is that, rather than testing his theory that a man of his age would never obtain additional work, he never applied for any additional work. The issue, then, is whether Malagon fully mitigated his damages. I conclude that he did not. It is true that Baity, another of the discriminatees and a banquet server, earned enough to fully mitigate by being a part-time banquet server for only two employers. But Malagon did not, even though he sought as many hours as possible and never turned down an on-call assignment. He had to understand, at some point, which I find to be by the middle of 1997, that he had to apply to other hotels in order to make up for what he lost when the Grosvenor discharged him.

I thus conclude that Malagon made a good faith effort to obtain employment after he was discharged, and through the first two quarters of 1997. After that, by receiving jobs solely from Disney World and the Radisson, which paid him consistently far lower than what he had earned before, he indicated that he was satisfied with working less. That may well have been due to his age. His tax returns indicate that his profession was "retired/waiter," a description that Malagon

explained was an error recorded by his tax preparer; but I find that description accurate, one that he probably gave for the filling out of his tax returns. He had been receiving Social Security benefits and a minimal union pension since 1991, and probably wanted less work. I conclude that the only backpay due to Malagon is for the last quarter of 1996 and the first two quarters of 1997, in the sum of $16,920.14, as stated in the Compliance Specification.

Lourdes Matos

Lourdes Matos, like Malagon, was also a full-time banquet server. Within two weeks of the beginning of the strike, she applied for work at the Radisson Twin Towers and in December 1996 at the Hilton and received on-call work from both. During that last quarter of 1996, she also applied for work at and obtained a little work from the Embassy Suites Hotel. The following year, she also applied for work and received some from the Airport Hyatt and the Palace Resort, and apparently, which I infer from a statement made by Respondents' counsel, also applied to Disney World. In the first quarter of 2000, Matos obtained a full-time position at the Hilton.

Respondents contend that they are not liable for any backpay for the last quarter of 1996 and the years 1997 and 1998 on the ground that she made insufficient efforts to obtain work. I disagree. As shown by Baity, her three applications for work in the last quarter of 1996 may well have been sufficient to produce interim earnings in amounts equaling what she would have earned, had the Grosvenor not fired her. In addition, she made further efforts to obtain work from other employers in 1997 and was on call from at least five hotels; and, unlike Malagon, there is nothing in the record that suggests that she stopped looking for enough work that would potentially result in a full income or that her reliance on getting full-time employment from five employers was not honest and in good faith. Respondents do not meet their burden merely by showing minimal interim earnings. They must affirmatively show that Matos "neglected to make reasonable efforts to find interim work." *NLRB v. Miami Coca-Cola Bottling Co.*, 360 F.2d at 575–576. They did not. I find that she reasonably mitigated her damages and conclude that her backpay is $32,119.63, as stated in the Compliance Specification.

Frederic Meradin

Respondents' only dispute with the Compliance Specification regarding its backpay liability to Frederic Meradin, a houseman, concerns the first three quarters of the backpay period. He applied for work on November 1, 1996,[26] at Disney World and in December at the Royal Plaza. On January 3, 1997, he registered for work with IATSE. He again applied to the Royal Plaza in March 1997 and applied for work at the Howard Johnson Inn and the Radisson Plaza in April.

His registration with IATSE resulted in his obtaining work from January 7, 1997 until sometime in February, 1997, as well as work for another employer sometime in 1997. On June 21, 1997, Meradin was hired at Disney World, where he remained employed throughout the remainder of the backpay period. As a result, looking at his entire backpay period, it is clear that Meradin made a good-faith effort to obtain interim employment. *Wright Electric, Inc.*, 334 NLRB 1031. Furthermore, he applied to two employers in the last quarter of 1996, one of which applications led to full-time employment; and, through his registration with IATSE, Meradin was able to obtain employment, although not as much as Respondents contend he should have, based on what other discriminatees received from IATSE. But, as the General Counsel cogently

[26] I agree with the General Counsel's contention that Respondents' failure to establish when in November a discriminatee searched for work should lead to the finding that he searched on November 1.

argues, Respondents provided no evidence that Meradin rejected referrals, made himself unavailable, or otherwise incurred a willful loss of earnings. Furthermore, Respondents' comparisons are somewhat misleading, because the record does not break down the discriminatees' earnings from IATSE referrals by quarter. It could well be that there was little work in the first quarter of 1997. It could also be that Meradin was called by IATSE, but simply missed the call, only to be placed in the back of the referral list.

I conclude that Meradin is entitled to $23,849.13 as backpay, as stated in the Compliance Specification.

Deborah Montgomery

Deborah Montgomery, a laundry attendant, searched for work at two employers in October 1996, three in November, and five in December. She searched at hotels, retail stores, and a cleaning service. She searched for work in January 1997 at the Caribe Royal and was hired on January 30 as a cashier at K-Mart. She asked for a full-time position but K-Mart reserved full-time positions for employees with more seniority, so she worked about 34 hours per week. Respondents contend that Montgomery's search for employment was inadequate, insisting that she made only 11 applications and that, had she made more, increasing her searches to 30 searches during that four-month period, her probability of success would have been 95 percent, versus failure of less than 5 percent.

I reject this "probability of success" argument, finding, first, no basis in Board law for it. What she did was conduct a perfectly reasonable search for employment. The Board does not require the extraordinary efforts that Respondents would have her make. *Atlantic Limousine, Inc. v. NLRB*, 243 F.3d 711, 721 (3d Cir. 2001); *NLRB v. Arduini Mfg. Corp.*, 394 F.2d 420, 422–423 (1st Cir. 1968); *Delta Data Systems Corp.*, 293 NLRB at 737. Second, all that Respondents have shown is her probability of success, not the actual result of her search. Respondents concede that they are not asserting that "the probability analysis is a literal predictive tool." In fact, it is not; and that is the reason that I reject its use in this proceeding. Finally, there is no proof in the record that Montgomery spent her time on the picket line, to the exclusion of looking for interim employment. In sum, I find that Montgomery's search was sufficient, and I will not deny her backpay for the last quarter of 1996 and the first quarter of 1997.

Montgomery quit her position with K-Mart on March 28, 1998, after a co-worker had been rude to her and embarrassed her in front of her regular customers. She had no job until June 19, 1998, when she started working at Winn Dixie. Respondents contend that she is not entitled to backpay after she quit K-Mart, but her quit appears to be justifiable, in light of her embarrassment. Respondents bear the burden of proving that she was not justified in quitting K-Mart, and did not. *Lundy Packing Co.*, 286 NLRB at 144 (1987). I reject Respondents' position. Then she quit Winn Dixie, first, because she had been hired by Publix on July 29, 1998, and it offered higher wages; and, second, because Winn Dixie had required her to sell unsanitary corned beef that had an expired date. That is more than ample justification for her to leave her employer.

Respondents contend that she was not entitled to backpay for the period while she was working at K-Mart, because she chose voluntarily to work for much-reduced hours at a much-reduced rate of pay. That is not so. Montgomery testified without contradiction that her employment was part-time and, as she continued to work, she would progress to a full-time job, all in accord with the normal practice of the grocery industry. Insofar as Respondents contend that her starting wage was $5.00 an hour, $2.00 per hour less than she was earning at the

Grosvenor, that is the Grosvenor's fault, not hers. Montgomery had 10 years of seniority at the Grosvenor, and none at her interim employment.

Respondents also contend that, beginning with her employment with K-Mart, and continuing while she was working for Winn Dixie and Publix, Montgomery failed to look for a higher-paying job with more hours, as required in order to mitigate damages. I disagree. I find that she obtained the employment that was available to her. *NLRB v. Madison Courier*, 472 F.2d at 1320. I reject the notion that requires someone who worked in the Grosvenor's laundry had to select only certain kinds of jobs for her interim employment, and that work in a grocery, where one had to start as a part-time employee, was excluded from the types of jobs she could take. *Avon Convalescent Center*, 219 NLRB 1210, 1211 fn. 5 (1975), enfd. in part, denied in part 549 F.2d 1080 (6th Cir. 1977). In addition, I note that, in fact, she remained with Publix long enough to become a full-time employee, often working 35 hours or more per week, beginning in February 1999, although her hours, starting in 2001, often still dipped to less than 30, and sometimes less than 24, for reasons unexplained in the record. The point is that, based on her employment, she was trying as best she could to earn a living and thus was making a reasonable attempt to mitigate her damages.

The final issue regarding the accuracy of the Compliance Specification stems from her taking a voluntary six-month leave of absence from Publix, from January 20 until July 17, 2001, to travel to Ohio to take care of her ill sister. Although she testified that she worked continuously for United Dairy Farmers, Wunderlichs Market, and Burger King during her stay in Ohio, her interim earnings for the first two quarters of 2001 are about 40 percent of what she had been making at the end of 2000, and her interim earnings for the third quarter is about 25 percent less. Because her testimony is that, in July 2001, she returned to the same Publix store that she worked in before, and earning the same rate of pay as she was paid before January 2001, the amount that she should have earned, had she not left, should have been $4,074.45 each quarter, the amount she earned each quarter during the preceding year. So, I will adjust the interim earnings for the first three quarters of 2001 by assuming that she would have made that amount for five-sixths of the first quarter, all of the second quarter, and one-sixth of the third quarter. I have used her actual figures to compute the remainder of the first and third quarters, to wit, one-sixth of $1,638.54 in the first quarter and five-sixths of $3,016.36 in the third quarter. The result is as follows:

Year	Qtr.	Gross Backpay	Interim Earnings	Net Backpay
2001	1st	4,639.21	3,668.47	970.83
2001	2d	4,639.21	4,074.45	564.76
2001	3d	4,639.21	3,192.71	1,446.50

I conclude that Montgomery's backpay is $39,038.30.

Charitable Ovince

Charitable Ovince, a room attendant, searched for work at at least two employers during November and two more in December 1996. One of these may or may not have been a new hotel at which she applied, but she could not remember. (Ovince was 67 years old when she testified.) She was hired as a room attendant at the Swan Hotel on January 27, 1997, but sustained an injury on February 11, and was sent home. The hotel would not permit her to return. She again looked for work and was hired on March 4, 1997, by the Quality Inn, where she remained during the entire backpay period.

Respondents raise two issues. First, they claim that her search for work during the fourth quarter of 1996 was inadequate. I reject that contention for the reasons previously expressed, noting that viewing the entire backpay period shows that she was constantly employed. *Electrical Workers IBEW Local 3 (Fischbach & Moore)*, 315 NLRB at 1266. The second issue is more problematic. As of June 1, 1999, she began working a 24-hour part-time schedule. On the basis of her reduction of hours, the General Counsel amended the Compliance Specification by reducing her gross backpay, not by 25 percent, based on its assumption that a 32-hour work week was the measure of a regular full-time schedule, as Compliance Officer Marksteiner testified, but by 40 percent, based, I find, on her belief that Ovince had reduced her hours from a 40 24 weekly.

During the hearing, the General Counsel again rethought the Compliance Specification based, first, on the fact that the Grosvenor's handbooks established 32 or 30 hours per week as the minimum for "regular" employees. Then, upon further reflection, because the collective-bargaining agreement conferred regular status on unit employees who worked a regular schedule of 24 to 40 hours, the General Counsel determined that he should not have reduced Ovince's backpay at all, because she worked 24 hours each week. So the Compliance Specification was again amended to restore her backpay figures, as originally stated.

I find that the General Counsel obtained the correct result in his final amendment, but only based on my ruling regarding the effect of Respondents' failure to produce the Grosvenor's payroll records. Respondents refused to produce Ovince's payroll records for a reason. I infer that their reason was that she did not work 40 hours and that her part-time schedule at the Quality Inn was substantially equivalent to her job at the Grosvenor. If that inference is incorrect, Respondents have only themselves to blame.

I conclude that Ovince is entitled to $37,309.48, as stated in the Compliance Specification.

Joseph Paschal

Respondents dispute only the fourth quarter of 1996 backpay liability due to Joseph Paschal, a bellperson. Paschal looked unsuccessfully for work at two employers during November and also registered with IATSE, which referred him to work, his first job starting on November 18, 1996. He continued to work through IATSE referrals for the remainder of the backpay period. In accord with my prior legal conclusion, looking at his employment in every one of the 25 quarters of the backpay period, I find that Paschal's search for employment, which was, by mid-November, successful, satisfied his duty to mitigate damages. I conclude that his backpay is $9,186.21, as the Compliance Specification states.

Marie A. Pierre

Marie A. Pierre, a room attendant, applied for a job at and was hired by Disney World on November 27, 1996, began work on December 7, 1996 as a room attendant, and worked in this position throughout the remainder of the backpay period. Respondents contend that she is not entitled to backpay for the period of September 27, 1996 through December 7, 1996, based on her failure to mitigate damages during this period. As noted above, no claim has been submitted for any period prior to the September 30 date that all the discriminatees were fired. Regarding Respondents' contention that, according to her Search for Work Report, she submitted only one application in the fourth quarter, that on November 27, I have previously rejected Respondents' claim, and do so here, particularly based on her employment throughout the backpay period.

Wright Electric, Inc., 334 NLRB 1031. I conclude that her backpay is $4,400.12, as stated in the Compliance Specification.

Louis Preval

Louis Preval, a houseman, was 65 when the Grosvenor discharged him. He applied for work at the Royal Plaza in October 1996, Disney World in November, and the Holiday Inn in December, Renaissance Hotel in January 1997, the Sheraton Hotel in February, and Florida Hospital in March. He also applied to other hotels, but he forgot who they were. Although those attempts to obtain employment were unsuccessful, his registration with IATSE on January 8, 1997, resulted in his receiving a referral for work with GES Exposition Services from January 24 until February 20, 1997, and numerous other contractors throughout the remainder of the backpay period, although, as time went on, he could not handle the heavier work involved in setting up conventions. He also continued to search for additional work, both at places he had gone to before as well as new ones, a total of six attempts in the second quarter of 1997, shortly before the end of which he was hired as a houseman by yet another employer to whom he had applied, Holiday Inn. But he was laid off from this job a mere two and one-half weeks later, because there was not enough work at the hotel to retain all the staff and he had no seniority. Respondents' attack on his testimony about this layoff was silly, in light of the fact that both of their witnesses were merely guessing; neither had even the slightest knowledge of the facts leading to his losing his job. Preval continued to search for work into the third quarter, applying to three hotels, and credibly testified that from the time that he was laid off through the third quarter of 1997, he looked for work at even more employers, but he forgot them by the time that he sent in his Search for Work Reports.

Respondents attack his record on various grounds, but most of the attack is leveled at the low amount of Preval's interim earnings, particularly through 1997. They theorize that, because he was receiving Social Security and strike benefits, he must have been relying more on that money and less on going to work. But that is mere speculation. He was 65 years old on July 18, 1996, and started receiving Social Security benefits while he was still employed by the Grosvenor. He did not quit and did not ask for fewer hours. Although he started work for IATSE in 1997, and his earnings there were not as high as some others who earned the better portion of their interim earnings setting up conventions, Respondents did not show that Preval purposely declined work. Rather, his Social Security Statement shows that his earnings kept increasing, so much so that no backpay claim is made for the years 2000, 2001, and 2002. The backpay claimed for the year 1999 is $778.29 per quarter, and his interim earnings were 76 percent of what he would have made had he not been fired by the Grosvenor. Similarly, the backpay claimed for the year 1998 is $1,022.46 per quarter, and his interim earnings were 67 percent of what he would have made had he remained an employee of the Grosvenor.

On the basis of his employment record during the entire backpay period, he was not taking less work because he was receiving Social Security benefits. Otherwise, he would have continued to rely more on them than on taking more work. Furthermore, he made sufficient attempts to gain employment in line with his prior employment as a houseman and in light of his age (he was 73 when he testified in this proceeding). I conclude that Respondents did not prove that Preval did not mitigate his damages and that he is owed $18,837.25, as the Compliance Specification states.

Maria Quevedo

Maria Quevedo's Search for Work Report states, under the item of employment services where she registered, the date of November 10 and an address in Winter Haven, Florida, which

is the same as listed on her husband's Search for Work Report. He, Gilberto Carranza, testified that that was the address of IATSE, and I so find. In the item of reasons that she was unable to work, the word "strike" is circled. She also indicated that she started work at Disney World on December 21, 1996, where she remained an employee for the entire backpay period. Respondents contend that she should be denied backpay for the entire fourth quarter of 1996 on the ground that she made no effort to obtain interim employment. (Her Social Security Statement shows, however, very small earnings from Disney World and Mastercorp., the latter perhaps being a referral from IATSE.) However, she explained that she did not search for work earlier because she did not have a driver's license. When she worked for the Grosvenor, her husband drove her. When she obtained employment with Disney World, someone else took her. to her job because her husband was unavailable to drive her. A discriminatee should not be disqualified if her work search efforts are limited by the lack of transportation to job interviews. Viewing her mitigation effort in the context of the entire backpay period, she exercised reasonable diligence. *Wright Electric, Inc.*, 334 NLRB 1031.

In addition, Respondents contend that Quevedo was on a maternity leave of absence effective from September 27 to December 7, 2001, and received no regular wages. She did receive maternity leave pay, perhaps as much as $210 per week, but the amount was not reported for Social Security purposes. Her leave was for 10 work weeks and 2 days, or 72 days. Considering that there are 13 weeks in a calendar quarter, and 5 work days in each calendar week, I conclude that she was absent 52 work days. Although the Grosvenor has no provision for maternity leave, had she remained its employee, she would have been entitled to use towards her leave, her vacation of four weeks (20 work days) and 88 hours of personal time (11 work days). That leaves a total of 21 work days, towards which Respondents are entitled to a reduction of her backpay in the fourth quarter of 2001 of $1,692.81 [$5,239.33 (gross backpay for any given quarter during 2001) divided by 65 (workdays in a quarter) equals $80.61 (daily wage) multiplied by 21 (workdays to be credited) equals $1,692.81]. I conclude that Respondents' backpay liability to Quevedo is $12,083.72.

Earl Rankin

Earl Rankin, employed by the Grosvenor as a maintenance engineer, appeared to do more rough and finished carpentry (he was a carpenter before working for the Grosvenor) than engineering. Among the tasks that he performed as an employee of the Grosvenor, a period that went back to 1983, before Respondents acquired the hotel, was to repair damaged air walls, which separated sections of the ballroom so they can be used by separate parties; he fixed high pressure pipes and the air conditioning system; he occasionally swung sledgehammers and pushed wheelbarrows; and he poured concrete for a sidewalk and lifted railroad ties. But, mostly, he performed carpentry tasks; and his efforts to obtain employment as a carpenter at ten hotels during the fourth quarter of 1996 does not deserve the attack that Respondents made on his search for employment. Nor does the fact that he registered for employment with IATSE. And, in fact, he earned some money from IATSE referrals in that fourth quarter, starting on November 22, and continued to receive referrals, until May 12, 1997, when, he testified, the job of lifting and rolling huge amounts of carpet became too much for his back, and he could do it no longer. (His back improved after two weeks of not accepting IATSE referrals.)

Respondents attack that testimony, noting that Rankin stated that he had gone to the VA Hospital in Orlando about his back. Respondents subpoenaed records from the Hospital, which showed that, although he went there in late 1967, a half-year after his back pains had ceased, his complaints were about a condition unrelated to his back. From that, Respondents contend that Rankin lied. I do not agree. Even though Rankin's memory seven years later may not be as

sharp as Respondents would like (Rankin was 69 years old), I can understand that, even without going to a hospital, the kind of work that he was doing could cause him, or anyone else, back pain, severe enough that he would justifiably discontinue that line of work. It was not as if the IATSE jobs were using his carpentry skills. As a new hire, he mainly rolled aisle carpet and performed "pipe and drape" work, which consisted of setting up dividers with drapes to separate trade show exhibit booths, and then setting the furnishings, signs, and other accoutrements. Rolling carpet was the most undesirable job, disliked by new hires more than any other assignment and described as "[l]abor-intensive, on your knees rolling carpets for miles and miles and miles" and a "backbreaking job." He had a right to cease this work, not only because of its physical difficulty for him, *Lord Jim's*, 277 NLRB 1514, 1516 (1986); *Chem Fab Corp.*, 275 NLRB at 24, but also because the work was not even substantially equivalent to his former job with the Grosvenor. *Lundy Packing Co.*, 286 NLRB at 145.

Respondents also object to his "part-time IATSE work," but Baity's interim earnings demonstrate that, with time, Rankin could have earned sufficient amounts to mitigate fully his damages. I find, therefore, that Rankin reasonably sought work during the last quarter of 1996 and through May 15, 1997. On that day, three days after completing his last IATSE job, Rankin took a full-time job at Diamond Transportation, driving cars for at the Orlando airport and some long-haul driving to Jacksonville, Miami, and Sarasota, at $5.15 per hour, down from the $10.00 per hour that he was receiving on IATSE jobs, and worked there through the end of the third quarter of 1999, when he was being paid $6.00 per hour.

The General Counsel argues that Rankin legitimately lowered his sights by working for Diamond Transportation and continuing to search for carpentry work until 1999, relying on *Seattle Seahawks*, 304 NLRB 627, 636–637 (1991), enfd. sub nom. *Nordstrom v. NLRB*, 984 F.2d 479 (D.C.Cir. 1993). However, during this period of time, he was essentially the leader of the strikers (he was the Union's chief steward, and Fabian testified that he was "pretty much in charge when I wasn't there"), at least through early January 1998, when the strike ended; and his job at Diamond Transportation was scheduled later in the day, so that he could supervise the picketing in the morning. I also find that he looked for work only in the last quarter of 1997, when he applied for work at nine employers. I specifically reject his testimony that he looked for work at other employers and at other times, but merely forgot to put them on his Search for Work Reports. Rankin's earlier Reports contain such detail that it is unlikely that, as he testified, he was "[a]bsentminded," that he "goofed," and that he "just overlooked it."

I find instead that his Reports are accurate and that, after the last quarter of 1997, he stopped looking for work. Furthermore, even if he searched for some work, as he testified, his search was not a good-faith effort to obtain suitable and sufficient interim work. Whether that resulted from his filing for and receiving Social Security benefits in October 1996, as Respondents suggest, and earning enough, but not too much, so that his Social Security benefits would not be reduced, I need not decide. It is enough to find that he did not mitigate his damages from May 15, 1997, through the third quarter of 1997; he made a reasonable attempt to find employment in the fourth quarter of that year; and then he gave up all efforts. Accordingly, I conclude that $13,419.87 is due to Rankin as backpay, as follows:

Year	Qtr.	Gross Backpay	Interim Earnings	Net Backpay
1996	4th	$7,547.88	$3,084.50	$4,463.88
1997	1st	$7,701.85	$3,432.88	$4,268.97
1997	2d	$3,850.93	$3,432.88	$418.05
1997	4th	$7,701.85	$3,432.88	$4,268.97

Isidro Rodriguez

Isidro Rodriguez, a maintenance engineer, registered for work with IATSE on November 21, 1996, and, before that, looked for work and "turned a few applications in" or signed "a few applications" with employers. IATSE referred him for work with various contractors beginning on November 24, and he worked referrals until February 12, 1997, when he started working for Disney World as a maintenance person on and worked solely, except for a day, in this position throughout the final 24 quarters of the backpay period. Respondents object that he did not look for work until he began accepting IATSE jobs and so should be denied backpay for October and through November 24, 1996. Because I have found that he did, in fact, look for work with other employers prior to his IATSE registration, I reject Respondents' objection. In any event, his entire work history persuades me that he was attempting to, and did successfully mitigate his damages. *Wright Electric, Inc.*, 334 NLRB 1031. I conclude that Respondents owe him backpay of $2,583.94, as stated in the Compliance Specification.

Feliza Ryland

Feliza Ryland, a room attendant, applied for a job at the Embassy Suites on November 22, was hired, began to work there on November 29, 1996, and left on January 29, 1997, when she took a job at Disney World because it paid more. She remained there for the rest of the backpay period. Respondents dispute her claim for the fourth quarter of 1996, based on her failure to mitigate damages during this period. Based on my prior ruling, and especially considering her work history during the entire backpay period, I conclude that she is entitled to backpay for the fourth quarter of 1996 and that Respondents owe her backpay of $10,024.84, as stated in the Compliance Specification.

Raymond Smith

Raymond Smith, a bellperson, was 67 years old when discharged and died in 2004. Respondents' brief essentially recognizes, in these circumstances, the difficulty of proving that Smith did not mitigate his damages, especially in light of the testimony of so many of the discriminatees that they did not record all their searches for employment. Respondents write:

> Respondent is substantially prejudiced in its ability to meet its burden of proving a failure to mitigate damages as Mr. Smith is deceased and could not be called as a witness. Respondent was also unable to call any witnesses close to Mr. Smith, and his wife has passed away. His stepson was called, but his stepson was not close to Mr. Smith during his life, and testified also that Mr. Smith had "no friends," and therefore no one Respondent can call to try and establish for the record what was going on in Mr. Smith's life during the backpay period.

What is in evidence is Smith's Search for Work Reports, which state that he searched for work at the Radisson Twin Towers, the Courtyard Marriott, and the Howard Johnson's Universal Tower in October 1996. He had an angioplasty and was incapacitated from November 17 to 30, 1996, which is excepted from Respondents' backpay liability. He searched for work at four employers in the first quarter of 1997, another four in April, and two in May. He also sought work through the Union at the Hilton in May and at the Radisson Twin Towers in June. He underwent surgery in the fourth quarter of 1997, which is another period excepted from backpay liability. He continued his search for work during the first quarter of 1998 at six employers and sought work at two other employers through the Union. He searched for work at K-Mart on April 7, Gooding's on April 20, Albertson's on May 4, and Publix on May 30, 1998, indicating on his Publix application that he was available to work all hours and days.

Smith was finally hired, his first employment, by Publix to bag groceries on May 30, 1998. He worked there until November 9, 1998, when he left for K-Mart because, he wrote, of its higher pay and better working conditions. He started there on November 20, 1998. Smith was laid off by K-Mart on January 3, 1999, because the holiday season ended. He then searched for work at seven employers in the first quarter of 1999, another 10 employers in the second quarter, and four employers in July, including Embassy Suites, which hired him as a breakfast greeter on July 29, where he remained through January 12, 2001. He then had eye surgery, and did not return to work. The Compliance Specification excepts the period from January 15, 2001 through the end of the first quarter of 2001, after which Smith withdrew from the labor market.

While first claiming that Smith did not seek substantially equivalent work, Respondents also contend that Smith unreasonably limited his search to bellman jobs. Smith was, of course, a bellman (bellperson), and it was nothing but reasonable for him to seek a job with which he was familiar. Respondents further contend that he could not have made a reasonable search for employment because he was unsuccessful for 20 months. But the Grosvenor fired him, and he was 69 years old, and not exactly one whom employers would select, if they had a choice. I recognize that there is no Report for the third quarter of 1997, so there is no record that he searched for a job during that quarter, but the Board does not require that he search for jobs each and every quarter, especially when he has so many job applications pending. The Board does not require him to repeat searches that are likely to prove futile. *Cornwell Co.*, 171 NLRB 342, 343 (1968). In any event, I am loathe to find, from the mere fact that there is no Report in the Regional Office's files, that Smith did not search for employment. Again, as held above, the discriminatee gets the benefit of the doubt.

Respondents also complain that, when Smith finally obtained employment, he took a part-time job. In light of my ruling on the General Counsel's motion for an adverse inference and to strike one of their defenses, there is nothing in this record that shows how many hours Smith regularly worked at the Grosvenor. Respondents, therefore, cannot prevail on their claim that Smith accepted interim employment based on fewer hours. In any event, the record does not reveal that he was offered a full-time job by anyone; and the credited testimony reveals that, in similar stores, such as groceries, employers hired new employees only in part-time positions. Respondents also complain that Smith moved around from job to job, but Smith wrote on his Report that he moved from Publix to K-Mart because he received higher pay and better working conditions. He lost his job at K-Mart because the employer laid him off. I reject Respondents' contention that "the only reasonable conclusion is that he was making only token efforts at a job search . . . in the robust, tight-job-market of Orlando." Smith's history demonstrates how little value Respondents' expert testimony has when it fails to consider the plight of unemployed, unskilled, and elderly persons. Finally, Respondents argue that Smith was not able to obtain employment "due to physical problems." There is nothing in the record to sustain that proposition, except that he had some relatively minor surgery. The General Counsel excepted the periods when he was disabled.

Accordingly, I conclude that the backpay due to Smith is $57,140.55, as stated in the Compliance Specification. In doing so, I reject, as legally unfounded, Respondents' contention that this amount is "impermissibly punitive."

Cleofas Viscaino-Hernandez,

Cleofas Viscaino-Hernandez, a room attendant, made a single application to Disney World on December 2, 1996, was hired, started work on December 11, and worked there for the rest of the backpay period. Respondents dispute her claim for the fourth quarter of 1996, based on her failure to mitigate damages. In light of my ruling above, I find that, in spite of her delay,

Viscaino-Hernandez reasonably mitigated her damages, especially in light of her employment throughout the remainder of the backpay period, *Wright Electric, Inc.*, 334 NLRB 1031; and I conclude that Respondents' backpay liability is $22,612.38, as stated in the Compliance Specification.

Flossie Williams

Flossie Williams, a room attendant, died on July 3, 1997. According to her Search for Work Report, she searched for work in November 1996 at Disney World and, in December, C.F.I. Westgate Lake Resort. She started working for Disney World on December 11, 1996, and worked there until February 15, 1997. No backpay is claimed after that date. Respondents contend that, by not beginning to work until December 11, and having only two applications in the 71 days prior to then, she did not mitigate her damages. Again, for almost all the reasons previously expressed—due to her death, she obviously had no lengthy history of employment throughout the backpay period—I disagree; and I conclude that she is owed $5,254.01, as stated in the Compliance Specification.

Medical Expenses

The General Counsel seeks reimbursement for certain out-of-pocket medical expenses incurred by nine discriminatees during the backpay period. Respondents' brief is silent, from which I infer that it has no opposition. Indeed, it stipulated to the legitimacy of some of these expenses; and the record sufficiently demonstrates that the named discriminatees incurred all these expenses. Shortly after the Grosvenor terminated the discriminatees, it gave them a notice under COBRA, the Consolidated Omnibus Budget Reconciliation Act of 1985, 29 U.S.C. §1161, that they could continue their benefits under its Employee Health Plan. The following paid the following amounts, which are more that they would have paid as the Grosvenor's employees, for which Respondents must reimburse them: Alvarez, $313.89; Collier, $620.50; Day $2,129.93; Jackson, $927.11; and Malagon, $313.89. In addition, the following discriminatees incurred out-of-pocket medical expenses, for which they would have been covered had they remained the Grosvenor's employees: Davis, $221.55; Ovince, $626.97; Preval, $266.00; Malagon, $11,224.29; and Rankin, $1,172.08. I conclude that Respondents must reimburse them for these amounts, too.

Interest

In a post-hearing motion, the General Counsel moved to strike Respondents' reply brief, claiming that, for the first time, Respondents addressed the issue of interest on the backpay, arguing that bankruptcy law prohibits the accrual of post-petition interest. Whatever merits that position may have, and the General Counsel appears to concede, at least partially, that it has some merit, because he has requested that I separately identify the dollar amounts of the overall backpay award and the interest accrued on the award from September 30, 1996 until the Debtor, which is named as "Grosvenor Orlando Associates, a California limited partnership, d/b/a Grosvenor Resort," filed for bankruptcy on February 3, 2004, I find that the normal order granting interest in accord with the Board's normal practice will effectuate the purposes of the parties' rights. Clearly, the United States Bankruptcy Judge knows the identity of the bankrupt (Respondents question that they are all subject to the Judge's Amended Order Confirming Amended Plan of Reorganization; the General Counsel contends that they are not) and when the liability of whoever is bound ceases for the purpose of paying interest. I further feel certain that the General Counsel will assist the Bankruptcy Judge by giving a detailed computation of all interest due under this Decision. In this respect, the General Counsel's motion to strike is denied.

On these findings of fact and conclusions of law and on the entire record, including my reading of the briefs and reply briefs submitted by the General Counsel, Respondents, the Union, and the discriminatees, and my observation of the witnesses as they testified, I issue the following recommended[27]

SUPPLEMENTAL ORDER

Respondents Grosvenor Orlando Associates, Ltd., its officers, agents, successors, and assigns, doing business as The Grosvenor Resort, and its general partners, Grosvenor Properties, Ltd., Donald E. Werby, and Robert K. Werbe shall pay to each of the following discriminatees the amounts set forth opposite their respective names, plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), and minus tax withholdings required by Federal and State laws:

DISCRIMINATEE CLAIMANTS	**NET BACKPAY**	**FICA MATCH**	**MEDICAL EXPENSES**	**SUM TOTAL**
Francisco Abreu	$11,917.67	$911.70	-	$12,829.37
Andres Alvarez	$55,148.31	$4,218.85	$313.89	$59,681.05
Robert Baity	$25,653.52	$1,962.49	-	$27,616.01
Rosetta Brown	$2,480.05	$189.72	-	$2,669.77
Hector Caban	$9,109.49	$696.88	-	$9,806.37
Gilberto Carranza	$1,035.38	$79.21	-	$1,114.59
Dorothy Collier	$5,611.55	$429.28	$620.50	$6,661.33
Ella Mae Davis	$2,308.33	$176.59	$221.55	$2,706.47
Lindsey Day	$4,935.73	$377.58	$2,129.93	$7,443.24
Carlos Delgado	$7,015.79	$536.71	-	$7,552.50
Enoch Deneus	$9,659.27	$738.93	-	$10,398.20
Oslaine Desir	$22,356.44	$1,710.27	-	$24,066.71
Aida Febles	$12,452.92	$952.65	-	$13,405.57
Maria Gillaspie	$5,067.53	$387.67	-	$5,455.20
Deborah Goodman	$15,797.39	$1,208.50	-	$17,005.89
Israel Hernandez	$5,255.46	$402.04	-	$5,657.50
Lidia Hernandez	$15,983.64	$1,222.75	-	$17,206.39
Betty Jackson	$14,789.40	$1,131.39	$927.11	$16,847.90
Mollie Jackson	$10,274.61	$786.01	-	$11,060.62
Flor Javier	$12,254.20	$937.45	-	$13,191.65
Margarita Jimenez	$22,365.01	$1,710.92	-	$24,075.93
Jules Josaphat	$33,135.01	$2,534.83	-	$35,669.84
Therese Josaphat	$21,093.98	$1,613.69	-	$22,707.67
Dorzelia Joseph	$11,517.38	$881.08		$12,398.46
Paul LeBlanc	$2,956.70	$0.00	-	$2,956.70
Adisseau Louisius	$24,485.86	$1,873.17	-	$26,359.03
Martin Malagon	$16,920.14	$1294.39	$11,224.29	$29,438.82
Lourdes Matos	$32,119.63	$2,457.15	-	$34,576.78

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

Frederic Meradin	$23,849.13	$1,824.46	-	$25,673.59
Deborah Montgomery	$39,038.30	$2,986.43	-	$42,024.73
Charitable Ovince	$37,309.48	$2,854.17	$626.97	$40,790.62
Joseph Paschal	$9,186.21	$702.75	-	$9,888.96
Marie A. Pierre	$4,400.12	$336.61	-	$4,736.73
Louis Preval	$18,837.25	$1,441.05	$266.00	$20,544.30
Maria Quevedo	$12,083.72	$924.40	-	$13,008.12
Earl Rankin	$13,419.87	$1,026.62	$1,172.08	$15,618.57
Isidro Rodriguez	$2,583.94	$197.67	-	$2,781.61
Feliza Ryland	$10,024.84	$766.90	-	$10,791.74
Raymond Smith	$57,140.55	$0.00	-	$57,140.55
Cleofas Viscaino-Hernandez	$22,612.38	$1,729.85	-	$24,342.23
Flossie Williams	$5,254.01	$0.00	-	$5,254.01

The total backpay of $4,378.45 due to Maria Hernandez, $7,894.27 due to Norma Jimenez, and $78,240.83 due to Adriana Sepulveda, together with the applicable FICA match of .0765 percent, shall be paid to the Regional Director for Region 12 and will be held in escrow for 1 year. In the event they appear, or any one of them appears, to collect this backpay, Respondents will be offered an opportunity by the Regional Director to produce evidence or examine them about their interim earnings.

Dated, Washington, D.C. June 29, 2005

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Benjamin Schlesinger
Administrative Law Judge